LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 513

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND OMAHA GRAIN EXCHANGE OF OMAHA, NEBRASKA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

FILED JANUARY 7, 1951

Probable jurisdiction noted March 3, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 513

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND OMAHA GRAIN EXCHANGE OF OMAHA, NEBRASKA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

INDEX

	Original	Print
Proceedings before the Interstate Commerce Commission	a	1
Secretary's certificate (omitted in printing)	a	
Complaint	1	1
Answer of Missouri Pacific Railroad Company (omitted in printing)	1e	
Petitions of the Board of Trade of Kansas City, Mo., The St. Joseph Grain Exchange, J. C. Lysle Milling Co. and the Topeka Chamber of Commerce for leave to intervene and orders granting same (omitted in printing)	1	
Transcript of hearing, April 17 and 18, 1946	1	3
Appearances	1	3
Testimony of John A. Kuhn	8	6
A. A. McKinley	20	15
A. M. Connors	31	22
C. J. Bindner	39	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAR. 7, 1952.

	Original	Print
Proceedings before the Interstate Commerce Commission—Continued		
Transcript of hearing, April 17 and 18, 1949—Continued		
Testimony of—Continued		
Walter Wicker	77	54
Edward L. Vauck	99	68
C. J. Bindner (recalled)	107	73
William F. Allison	108	74
E. C. Owens	122	83
C. F. Real	130	89
Walter R. Scott	140	95
N. K. Thomas	174	117
John A. Kuhn (recalled)	212	143
Complainant's Exhibits:		
No. 1—Statement of rates and distances on grain and grain products, etc.	230	154
No. 2—Statement of rates on grain and grain products published by the Missouri Pacific R.R., etc.	231	155
No. 3—Rough sketch of the Rock Island, Missouri Pacific and C. B. & Q. Railroads, etc.	232	156
No. 4—Schedule showing present rate from Lenora to Chicago via Kansas City, etc.	233	157
No. 5—Schedule showing Missouri Pacific tariff ICC No. A-9822, etc.	234	158
No. 6—Application of the Missouri Pacific Railroad filed with the Western Trunk Line Committee	235	158
Nos. 7-65, inclusive—(Omitted in printing)	236	
Record from U.S.D.C. for the Eastern District of Missouri, Eastern Division	1	159
Complaint	1	159
Affidavit of A. Kuepfert (omitted in printing)	5	
Exhibit 1—Report and order of the Commission on Reconsideration, July 10, 1950	8	163
Exhibit 2—Report of the Commission, Division 2, August 31, 1948	15	171
Exhibits 3 and 4—(Omitted in printing)	22	
Answer of the United States of America	24	180
Intervention of the Interstate Commerce Commission (omitted in printing)	26	
Answer of the Interstate Commerce Commission	27	181
Petition of Omaha Grain Exchange, a Corporation, for leave to intervene (omitted in printing)	33	
Answer of the Omaha Grain Exchange, a corporation	34	185
Telegrams and Orders re postponement of the effective date of the order organizing three-judge court (omitted in printing)	40	

Record from U.S.D.C. for the Eastern District of Missouri, Eastern Division—Continued

	Original	Print
Plaintiff's brief (omitted in printing)	48	
Brief for the United States of America (omitted in printing)	83	
Brief of the Interstate Commerce Commission (omitted in printing)	95	
Transcript of proceeding on hearing June 14, 1951 to enjoin, set aside, annul and suspend an order	135	190
Appearances	135	190
Statement of Toll R. Ware	138	190
William J. Hickey	164	206
Samuel R. Howell	185	218
Oscar J. Moberg	197	226
Final judgment and decree	213	235
Petition for appeal	214	236
Order allowing appeal	216	237
Order directing transmittal of original exhibits (omitted in printing)	218	
Citation on appeal (omitted in printing)	219	
Assignment of errors	221	238
Opinion, Hulen, J.	255	242
Dissenting opinion, Moore, J.	263	249
Statement directing attention to the provisions of paragraph 3, rule 12 of the Supreme Court	272	255
Certificate of service (omitted in printing)	274	
Praecipe (omitted in printing)	276	
Clerk's certificate (omitted in printing)	280	
Appellant's statement of points to be relied upon and designation of parts of record to be printed	281	255
Order noting probable jurisdiction	289	257

[fol. a] Secretary's Certificate (omitted in printing).

[fol. 1]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 29461

OMAHA GRAIN EXCHANGE OF OMAHA, NEBRASKA, Complainant,

v.

MISSOURI PACIFIC RAILROAD COMPANY (Guy A. Thompson, Trustee)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendants

COMPLAINT—Filed January 14, 1946

The complaint of the above named complainant respectfully shows:

I

That the complainant, Omaha Grain Exchange of Omaha, Nebraska, is a corporation, duly organized and existing under and by virtue of the laws of the State of Nebraska, with its principal place of business in the City of Omaha, that the constituent members of said complainant include merchants, manufacturers and millers engaged in the business of buying, selling, receiving and processing grain and the products thereof, and in shipping said commodities in interstate commerce, and that this complaint is filed on behalf of the members thereof.

[fol. 1a]

II

That the defendants herein are common carriers engaged in the transportation of property wholly by railroad between points in the states of Kansas, Nebraska and Iowa, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III

That the defendants herein publish rates and maintain for transportation of grain and grain products to the market of Omaha, Nebraska (which includes Council Bluffs, Iowa) rates and charges that are unjust and unreasonable in violation of Section I of the Interstate Commerce Act from points in Kansas located on the Missouri Pacific Railroad from Concordia, Kansas, and west, thereof known as the Central Branch, operating due west from Atchison, Kansas, and subjecting complainant to undue prejudice and disadvantage in violation of Section III of the Interstate Commerce Act. A few examples follow:

[fol. 1b]

From	To	Distance Via Concordia & CB&Q RR Miles	Rate per 100 lbs. (cents)	Distance direct via M.P. to K.C. miles	Rate per 100 lbs. (cents)
Lenora, Kans.	Omaha	336	30	341	19
Glade, Kans.	Omaha	296	28	301	19
Stockton	Omaha	283	28	288	19
Burr Oak	Omaha	242	24	247	18

From	To	Distance direct via Atchison	Rate per 100 lbs.
Lenora	Omaha	443	25½
Glade	Omaha	403	25½
Stockton	Omaha	395	25½
Burr Oak	Omaha	349	24½

Missouri Pacific Railroad tariff No. I.C.C. A-9719 provides rates via its own rails from the territory in question to Omaha predicated on the full local rates to Kansas City plus the going proportional rate of 6½ cents per 100 lbs. from Kansas City to Omaha. It is the contention of complainant that the route via Concordia and the C. B. & Q. Railroad is a practicable through route as provided in Section 15 of the Interstate Commerce Act, and that the rates to the market of Omaha should be no greater than the rates to the market of Kansas City. We failed in our negotiations with the Missoui Pacific Railroad to establish such route, hence this complaint.

[fol. 1c] Wherefore complainant prays that defendants may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future from the territory named in paragraph III hereof to the market of Omaha such other rates as the Commission may deem reasonable and just, and that such other and further order or orders may be made as the Commission may consider proper in the premises.

Omaha Grain Exchange. By John A. Kuhn, Traffic Manager-Registered Practitioner. 729 Omaha Grain Exchange Building, Omaha, Nebraska.

Dated at Omaha, Nebraska, January 12, 1946.

[fols. 1d-1s] *Duly sworn to by Charles H. Wright. Jurat omitted in printing.*

[fol. 1] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

TRANSCRIPT OF HEARING

Hotel Fontenelle,
Omaha, Nebr.,
Wednesday, April 17, 1946.

Met Pursuant to Notice, at 9:30 A. M.

Before C. E. Stiles, Examiner

APPEARANCES

John A. Kuhn, Traffic Manager, Omaha Grain Exchange, Grain Exchange Building, Omaha, Nebr., appearing for Omaha Grain Exchange, complainant.

Toll R. Ware, Attorney, Missouri Pacific Railroad Company, 2008 Missouri Pacific Building, St. Louis 3, Mo., appearing for defendants.

C. J. Bindner, General Freight Agent, Missouri Pacific Railroad Company, 1810 Missouri Pacific Building, St. Louis 3, Mo., appearing for Missouri Pacific Railroad Company, defendant.

[fols. 2-4] W. R. Scott, Secretary, and E. L. Peterson, Transportation Assistant, The Board of Trade of Kansas City, Missouri, 1419 Board of Trade, Kansas City, Missouri, appearing for the Board of Trade of Kansas City, Missouri, Atchison Board of Trade, and J. C. Lysle Milling Company, Leavenworth, Kansas, interveners in opposition to the complaint.

C. F. Real, Traffic Commissioner, Topeka Chamber of Commerce and Topeka Traffic Association, % Topeka Chamber of Commerce, Topeka, Kansas, appearing for Topeka Chamber of Commerce and Topeka Traffic Association, interveners in opposition to the complaint.

N. K. Thomas, Traffic Manager, St. Joseph Grain Exchange, 1404 Corby Building, St. Joseph, Missouri, appearing for St. Joseph Grain Exchange, intervener in opposition to the complaint.

[fol. 5] Proceedings

Exam. Stiles: Let us come to order, please.

The Interstate Commerce Commission has assigned for hearing at this time and place, docket No. 29461, Omaha Grain Exchange of Omaha, Nebr. v. Missouri Pacific Railroad Company and Chicago, Burlington & Quincy Railroad Company.

Who appears for the complainant?

Mr. Kuhn: John A. Kuhn, Traffic Manager, Omaha Grain Exchange.

Exam. Stiles: Admitted to practice?

Mr. Kuhn: Yes, sir.

Exam. Stiles: When entering your appearance, please state whether or not you have been admitted to practice before the Commission.

Who appears for interveners on behalf of complainant?

(No response.)

Who appears for defendants?

Mr. Ware: C. J. Bindner, 1810 Missouri Pacific Building, St. Louis 3, Mo., appearing for the Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), one of the defendants; and Toll R. Ware, 2008 Missouri Pacific Building, St. Louis 3, Mo., appearing for defendants. Both are admitted to practice, and both are present.

Exam. Stiles: Who appears for interveners in opposition to the complaint?

[fol. 6] Mr. Scott: E. L. Peterson and W. R. Scott, for The Board of Trade of Kansas City, Mo. Both these men have been admitted to practice. The same practitioners appear for the Atchison Board of Trade and the J. C. Lysle Milling Company. In addition, Mr. William F. Allison appears for the Atchison Board of Trade, and Mr. E. C. Owens for the J. C. Lysle Milling Company. They are connected with the institutions I have named.

Exam. Stiles: They are officials of those institutions?

Mr. Scott: Yes, sir.

Exam. Stiles: Giving their whole time to the service of the company?

Mr. Scott: That is correct.

Exam. Stiles: Off the record.

(Discussion off the record.)

Exam. Stiles: On the record. Are there any other appearances?

Mr. Real: C. F. Real, for the Topeka Chamber of Commerce and Topeka Traffic Association.

Mr. Thomas: N. K. Thomas, for the St. Joseph Grain Exchange, registered practitioner, St. Joseph, Mo.

Exam. Stiles: Mr. Real, did you state——

Mr. Real: I neglected to state, Mr. Examiner, I am admitted to practice.

Exam. Stiles: Any others?

(No response.)

[fol. 7] Mr. Kuhn, I will read for your approval a brief of the issue as I understand it. It is alleged that the rates on grain and grain products from points in Kansas on the Missouri Pacific Railroad, Concordia and west thereof, applicable over that railroad to Concordia, thence Chicago, Burlington & Quincy Railroad to Omaha, Nebr., and Council Bluffs, Iowa, are unreasonable and unduly prejudicial. The prayer is for just and equitable rates for the future.

Mr. Kuhn: Correct.

Exam. Stiles: You may call your witness.

Mr. Kuhn: I will make a statement. I will be the first witness, Mr. Examiner.

Mr. Real: Mr. Examiner, if I may, at this time I would like to intervene on behalf of the Topeka Traffic Association and Topeka Chamber of Commerce.

Mr. Ware: Mr. Examiner, before we get too far away from the statement of the issues, will you just give us a moment?

Exam. Stiles: All right, suspend the record.
You may bring your petition up.

(Discussion off the record.)

Go back on the record.
The petition of intervention filed by the Topeka Chamber of Commerce and Topeka Traffic Association is granted.

(The petition of intervention was received.)

Mr. Scott: We have no comment.
Mr. Ware: I have none.
[fol. 8] Exam. Stiles: You may proceed.

JOHN A. KUHN, was sworn and testified as follows:

Direct examination:

The Witness: My name is John A. Kuhn, Traffic Manager, Omaha Grain Exchange. I have occupied that position for the past 25 years. Previous thereto I was connected for 12 years with the Updike Grain Corporation of Omaha. Previous to that I was general freight agent of the lines of the North Western Railroad west of the Missouri River for a number of years.

Mr. Examiner; I feel a brief statement will be helpful to the Commission.

Some years ago, when the late Patrick McCarthy was in charge of grain rates for the Missouri Pacific Railroad, he came to Omaha and informed me that their grain business along their Central Branch, which is the territory here involved, was getting away from them by being hauled across country by producers to the Rock Island and other railroads which provided the same freight rates to Omaha as applied to Kansas City, and that it was his thought they would publish the Kansas City basis to Omaha, and desired to know if the Omaha market would canvass the Missouri Pacific territory involved. I assured him this would be done by radio and otherwise, and after tariff was published grain was shipped in some volume to the Omaha market. After Mr. McCarthy passed away, some other [fol. 9] Missouri Pacific official was placed in charge of grain matters, and the adjustment from the Central Branch to Omaha was disrupted.

By Exam. Stiles:

Q. Did that traffic move all the way over the Missouri Pacific?

A. Yes, sir. Because of a change in my office force and moving of my office, my records are incomplete on this subject; but under date of August 16, 1945, in a letter from Mr. Knepfert, of the Missouri Pacific, to me in answer to my inquiries protesting cancellation of the same basis to Omaha as to Kansas City, he advised me that this was done because of a conference held in St. Louis with their management, at which representatives of grain dealers and millers located at Kansas City, Leavenworth, Atchison, St. Joseph, and Salina were present. Note particularly the absence of an Omaha market representative—not invited.

Incidentally, there are 10 plants located on the Missouri Pacific at Kansas City with a capacity of 13,165,000 bushels of grain. There are two plants located on their tracks in Omaha, capacity 2,100,000 bushels.

In the first 17000 case, 164 ICC 619, rates to Omaha from Kansas on and south of the Union Pacific Railroad were set at 6 cents higher than the rates to Kansas City. No provision was provided in the second case, 205 ICC 301, in the matter of rates to Omaha. The Union Pacific in Kansas is possibly 40 to 50 miles south of the Missouri Pacific [fol. 10] Central Branch, but the Missouri Pacific took it for granted they could use the 6-cent basis above rates to Kansas City from their Central Branch, and that is the published basis today.

The Omaha market allowed the matter to rest, but in late years our terminal elevator and milling and manufacturing capacity has increased considerably, and I received instructions to negotiate with the Missouri Pacific to publish the Kansas City basis to Omaha the same as provided by the Burlington and Rock Island Railroads from their Kansas territory, and which railroads crisscross the Missouri Pacific at points in northern Kansas. They refused to make any adjustment, and their refusal was based strictly upon a mileage basis.

Omaha is the northern terminus of the Missouri Pacific, That the matter of mileage is of slight consequence generally to the Missouri Pacific I will show by exhibits which I will present.

I directed their attention to the fact that they were in violation of Section 3 of the Act, in that they were subjecting the locality involved to unreasonable disadvantage, at least west of Concordia; that since they claim their own route was unreasonably long to Omaha, that there was a practicable through route to Omaha via Concordia and the Burlington Railroad, and that the Commission was empowered under Section 15 (4) to provide that route, since it was 5 miles shorter to Omaha from all points west of [fol. 11] Concordia than their route to Kansas City. This proposal was also denied; hence this complaint.

I want to make it clear that we do not advocate a strict distance basis for grain rates. We are in thorough sympathy with the theory expounded by the late Commissioner Eastman and others that rates constructed purely on distances would be revolutionary and destructive to established commercial interests of enormous volume and value. Many years ago during debate on the Hepburn Act, Senator Stephens of Minnesota stated:

"An equal mileage basis would exclude our products from our best markets or greatly reduce the value of our products and our property."

Neither do I advocate distance where it favors us, and rejecting it elsewhere.

I have some exhibits, Mr. Examiner, which I would like to have marked at this time.

(The exhibits referred to were marked as complainant's exhibits Nos. 1 thru 6, Witness Kuhn, for identification.)

Exhibit No. 1 is a statement of rates and distances on grain and grain products proposed via Concordia, Kan., and the C. B. & Q. Railroad to Omaha; also present rates to Kansas City, including distances. You will note the distance under this exhibit to Omaha in every instance is [fol. 12] 5 miles less than the distance to Kansas City.

Exhibit No. 2 shows the Missouri Pacific tariff publishing rates from Hastings, Nebr., and Superior, Nebr., to Omaha, Nebr. From Hastings to Omaha and Superior to Omaha, 15 cents. That is the rate that was provided by the Commission, Mr. Examiner, in the 17000 case, and is the same rate as published by the Burlington and North Western Railroad. The routing of that grain is either via Superior or Hastings.

I have shown on this exhibit Warwick, Kan., just 9 miles south of Superior, on which we are asking that the Kansas City rate be applied to Omaha, or 17 cents per 100 pounds. The rate from Warwick to Omaha today is published at 23½ cents, or 6½ cents higher than the rate to Kansas City.

I might remark, incidentally, there is one elevator located at Warwick, a country elevator, and is owned and operated by a Kansas City firm. Needless to explain why there is no complaint from Warwick against the excessive rate from Warwick to Omaha.

Exhibit 3. This is a rough sketch of the Rock Island, Missouri Pacific, and C. B. & Q. Railroads to Kansas City and Omaha. I direct your attention to Phillipsburg on the Rock Island Railroad, just about 8 miles across country from Glade on the Missouri Pacific. The Rock Island publishes one and the same rates to Omaha and Kansas City, or 19 cents. The distance, Phillipsburg to Omaha, 234 miles; Phillipsburg to Kansas City, 299 miles; 19 cents. [fol. 13] Glade to Omaha, rate requested, 19 cents, for 285 miles. Glade to Kansas City, published 19 cents for 290 miles. The present rate from Glade to Omaha is 25½ cents via the Missouri Pacific direct.

I also direct attention to the fact that the distance from Phillipsburg on the Rock Island to Omaha, 243 miles, rate 19 cents, and the distance Phillipsburg to Kansas City is 299 miles, rate 19 cents,—56 miles in favor of Omaha, but we have never asked any lower rate based on our lesser distance, so long as the rates are on a parity to Omaha with Kansas City.

Exhibit No. 4. Using Chicago as the destination, the present rate from Lenora to Chicago via Kansas City is 35 cents per 100 pounds for a distance of 1,041 miles. The present rate from Lenora to Chicago via Omaha is 41½ cents per 100 pounds for a distance of 943 miles. The rate requested via Concordia and Omaha, 35 cents, the same as applies via Kansas City for a distance of 836 miles.

I call your attention to the fact at this time that there is an appreciable amount of business done by the Missouri Pacific Railroad from Kansas City via Omaha to Chicago and Chicago rate points.

Exhibit No. 5 was prepared because I understood that the Topeka representative would be here opposed to our request for the same rates to Omaha as to Kansas City.

Exam. Stiles: I take it that the use of Lenora in these [fol. 14] exhibits is just representative?

A. It covers all of the territory.

Exam. Stiles: It is just representative?

A. Yes, sir; just representative. And I didn't want to burden the record.

Missouri Pacific tariff ICC No. A-9822, Item 2285, provides free transit at Tokeka, Kan., on shipments from Lenora, destined to points in Arkansas, also Memphis, Tenn. The distance Lenora to Kansas City is 341 miles. The distance Kansas City to Topeka, 133 miles, round trip, 266 miles. The short line from Topeka to Memphis, for instance, is via Kansas City. That makes a through distance of 606 miles, on which they apply a rate of 19 cents from Lenora via Topeka back to Kansas City. But from Lenora to Omaha via Atchison, distance 443 miles, they provide a rate of 25½ cents per 100 pounds.

Exhibit No. 6. This is an application of the Missouri Pacific Railroad filed with the Western Trunk Line Committee February 14, 1946, requesting authority to publish the going proportional rate of 16 cents per 100 pounds from Council Bluffs, Omaha, and South Omaha to Chicago via Kansas City and St. Louis, in connection with the C. & E. I. from St. Louis to Chicago, with transit at St. Louis. The total distance via that route is 769 miles.

Exam. Stiles: That is an application which has not been published yet?

[fol. 15] A. Yes. Since I prepared this exhibit, advice has been received that that rate will be published effective on statutory notice in Western Trunk Line Tariff 322 series. I haven't received a copy of the tariff yet. It ought to be out by this time.

Now, I am giving these examples, Mr. Examiner, to refute the theory that these grain rates via their own route, if you please, are warranted because of distance as against the same rates to Kansas City; but since the railroad refused our request, we filed this complaint and provided for a route via Concordia and the C. B. & Q., which is taken care of under Section 15 of the Act, paragraph 4.

I think that is all I have to say, Mr. Examiner.

Exam. Stiles. You allege undue prejudice and preference. I don't think you made it quite clear on the record what points you want the Commission to find specifically are undue preferred.

A. All of the points shown in exhibit No. 1, sir. There are 26 of them.

Exam. Stiles: These points you allege are unduly prejudiced when shipping to Omaha and unduly preferred when shipping to Kansas City?

A. Yes, sir.

Exam. Stiles: Do you wish to cross-examine?

Mr. Ware: Yes.

[fol. 16] Cross-examination.

By Mr. Ware:

Q. Mr. Kuhn, Mr. McCarthy is dead, isn't he?

A. Yes. I so stated.

Q. When did he die?

A. Oh, 10 or 12 years ago.

Q. You don't know exactly when?

A. No.

Q. It was 1933.

A. If you say so, I will accept that.

Q. Mr. Kuhn, in your testimony you stated that you received a letter from Mr. Kuepfert dated August 16, 1945, in answer to your inquiries protesting the cancellation of the same basis to Omaha as to Kansas City?

A. Yes.

Q. When did that cancellation take effect?

A. Oh, I don't know the date. I explained particularly that my office had been moved two or three times, and my office records are not complete, so I can not give you the date. He no doubt has it, and if he has it, why, I will accept his statement as to when the transaction took place.

Q. Do you recall that it was about the year 1936?

A. Yes, sir; it was 1936 or 1937.

Q. It wasn't any later than that, was it, 1937?

A. Well, not his letter.

Q. No, I am not talking about the letter. I am talking [fol. 17] about when——

Q. Oh, when this change took place?

Q. Yes.

A. I think that was it.

Q. About 1936?

A. Yes, 1936 or 1937.

Q. And this is the first complaint that the Omaha Grain Exchange has filed?

A. The first formal complaint.

Q. Yes.

A. That it has filed; yes, sir.

Q. You stated that you were attacking the rate from points on the Central Branch of the Missouri Pacific in Kansas to Omaha over the route of the Missouri Pacific to Concordia, thence Burlington to Omaha?

A. After you had declined to give us a reasonable rate via your own raile, sir.

Q. Now, you used Lenora as a representative origin point out in Kansas. What is the rate which you are complaining of from Lenora over that route to Omaha?

A. From Lenora to Omaha, 25½ cents via your line direct, as against 19 cents to Kansas City.

Q. Would you read the question and answer, and would you answer the question?

(Record read by the reporter.)

[fol. 18] A. 30 cents per 100 pounds.

Q. You have a lower rate than that from Lenora over the Missouri Pacific direct to Omaha, do you not?

A. Yes, sir.

Q. What is that rate?

A. 25½ cents. Outrageous!

Q. Why don't you use the 25½-cent rate instead of the 30-cent rate?

A. We do not use the 25½-cent rate or the 30-cent rate. We can not do it against Kansas City competition. In other words, we are unable to do any business, and we are trying to seek, through the Commission, to force you to give us a reasonable basis of rates. You wouldn't do it by your own rails, so we have invoked Section 15, paragraph 4, in connection with the Burlington Railroad via Concordia. We think the law is clear on that point.

Q. How is the rate of 25½ cents over the Missouri Pacific from Lenora to Omaha made?

A. I regarded it as arbitrary by the traffic department of the Missouri Pacific Railroad.

Q. How is it made, if you know?

A. I don't know, but it represents 19 cents to Kansas City and 6½ cents proportional rate Kansas City to Omaha.

Q. Was that 6½-cent proportional rate prescribed by the Commission?

[fol. 19] A. From Kansas City to Omaha, but not in connection with the rate from Lenora.

Q. I understand. And the effect of your complaint here, Mr. Kuhn, would be on this traffic from Lenora, for example, which ordinarily moves Missouri Pacific direct to Omaha, to wipe out that proportional rate which the Commission prescribed between Kansas City and Omaha by giving you a route Missouri Pacific, Concordia, thence Burlington to Omaha, would it not?

A. You made the direct statement that the business now moves direct in connection with the rate of 6½ cents. That is not correct. There is no business moving that way. It can not move that way.

Q. You mean there is no grain traffic moving to Omaha over the Missouri Pacific direct?

A. From Lenora.

Q. From Lenora?

A. Yes, sir.

Q. How about any other point on the——

A. Not any other point on the Missouri Pacific, either.

Q. No Omaha grain at all?

A. Not from that territory where the rate is 6½ cents higher than the rate to Kansas City.

Q. Mr. Kuhn, on your exhibit No. 3, where you show the Rock Island and the Missouri Pacific situation, is it not true that from Norton and Phillipsburg and points on the Rock [fol. 20] Island to Omaha and to Kansas City, the Rock Island Railroad has its own single line?

A. Yes, sir; and it is one and the same rate.

Q. And the proposed route from origins on the Missouri Pacific in Kansas to Omaha, that of course involves a two-line route?

A. A two-line haul, providing you don't care to meet the Kansas City basis via your own rails.

Q. Does the Rock Island publish any joint rates with any other line from Phillipsburg to Omaha?

A. Not that I know of. We have never requested it, because the rates are reasonable over their own rails.

Mr. Ware: Thank you. That is all.

Exam. Stiles: Have the interveners any cross-examination? Do you wish to tender your exhibits at this time?

The Witness: If you please; yes, sir.

Exam. Stiles: Exhibits 1 to 6, inclusive, are received in evidence.

(Complainant's exhibits Nos. 1 thru 6, Witness Kuhn, were received in evidence.)

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Kuhn: I will call Mr. McKinley.

A. A. McKinley, was sworn and testified as follows:

Direct examination.

[fol. 21] By Mr. Kuhn:

Q. Will you state your name and business to the reporter, please?

A. My name is A. A. McKinley. I am vice-president and general manager of the Omaha Elevator Company, a grain firm in the Omaha market owning and operating a 2½ million terminal elevator in this market. Our office is 416 Grain Exchange Building, Omaha.

Q. What are the methods of securing your grain supplies for storage and merchandising through your terminal elevator, Mr. McKinley?

A. Well, there are a number of ways of securing grain. We buy a good deal of grain on the floor of the Omaha Grain Exchange. Samples are brought up there by the Exchange and are offered by people who have them consigned from the country, or bought from the country, to arrange to be sold to the highest bidder. We go on the market and bid for train. We also send out card bids to the country, after the close of the market generally, giving our price basis Omaha or track at country station. In that case we assume the freight. We also have a traveling man that travels the country soliciting consignments, and also buying grain to arrive, and we buy a good deal of grain by telephone ourselves from our own office, contacting our customers in the country.

Q. Do your traveling men travel the Central Branch of the Missouri Pacific Railroad, or do you card-bid that territory?

[fol. 22] A. No, indeed; there would be no use of doing that when the freight rates are against us. We would have no chance of getting any grain down there.

Q. Do you handle any grain produced in Kansas?

A. Yes, we handle considerable grain produced in Kansas on the Rock Island and Burlington Railroads, and some off of some points on the Union Pacific. There are times when it is very desirable for us to get that grain, especially in the—Well, take in Kansas, for instance, the crop movement is earlier than in Nebraska, and towards the end of our crop——

Q. You mean earlier in Kansas?

A. Earlier in Kansas than in Nebraska.

Q. All right.

A. And that has a tendency to change prices at times. And Kansas City will drop down in price on account of the large movement of grain into the market; and Omaha being rather short of grain holds their prices up, so that we at that time in particular attract a good deal of Kansas grain into the Omaha market. However, we attract grain in the Omaha market off and on throughout the season.

Exam. Stiles: Mr. Kuhn, didn't you testify that from points on the Union Pacific and south rates to Omaha were made 6½ cents higher than to Kansas City?

Mr. Kuhn: The main-line of the Union Pacific; yes, sir.

Exam. Stiles: Then will you develop from this witness [fol. 23] how he can draw grain from points on the Union Pacific if he can not from points on the Missouri Pacific?

The Witness: There are a few points on the Union Pacific where the rates are the same.

By Mr. Kuhn:

Q. Omaha and Kansas City?

A. Omaha and Kansas City, and that is the points where we attract the grain from, not from where the freight rates are higher to Omaha than they are to Kansas City. Those points are north of the main line, not on the main line. These are points north of the main line of the Union Pacific where the rates are equal to Omaha and Kansas City on the Union Pacific.

Q. And the business that you secure from Rock Island and Burlington points in Kansas, how are the rates, compared to Kansas City?

A. They are one and the same.

Q. In your experience as a grain dealer and purchaser, have you had any instances where there were discounts on what is known as "smutty" grain?

A. Yes, that is quite frequent. And the spread between the prices in the different markets varies according to the amount of that quality of grain that comes into the market.

If Kansas City receives considerable of that, or are too busy to handle it, their discounts widen; and in the Omaha market, having a short crop or a short movement, our discounts would hold up, and therefore we would attract that particular kind of grain to the Omaha market. That is also [fol. 24] true in connection with protein, for instance. At times the Omaha market needs protein, and steps up their price higher than Kansas City and attracts this grain from these points to Omaha rather than to Kansas City.

Q. In other words, the result is that your price at Omaha is higher than the price at Kansas City?

A. That is correct.

Q. Is there anything you care to add?

A. Well, I might say that if these rates from the Central Branch on the Missouri Pacific were the same to Omaha as they are to Kansas City, we would enjoy business from that territory also, and I feel that the producers in that territory have a right to the competitive situation of both markets, situated as they are.

Q. You mean you would actively canvass that territory, just the same as you do other territories?

A. That is correct.

Mr. Kuhn: That is all.

Exam. Stiles: Any cross-examination?

Mr. Ware: Yes, sir.

Cross-examination.

By Mr. Ware:

Q. Mr. McKinley, at what points in Kansas on the Union Pacific have you bought grain and from which points the rates to Kansas City and Omaha are the same?

[fol. 25] A. Well, I would have to check that up to make sure, but I will tell you it would be where the rates are the same to Omaha and Kansas City.

Q. Well, how many points on the Union Pacific——

A. There are not very many on the Union Pacific where that is true, I will grant you that. There are just a few points.

Q. What about the situation on the Rock Island?

A. There are quite a few points there. We get more from the Rock Island and the Burlington.

Q. Where is that Rock Island line from which you draw that traffic? Where is it located? Is it north of this territory about which you are complaining? Is it north of the Missouri Pacific?

A. Let me see the map. Yes, it is north.

Q. It is all north of the Missouri Pacific?

A. Yes.

Q. Now, how about the Burlington?

A. That is all north, too.

Q. That is all north of the Missouri Pacific?

Mr. Kuhn: Yes, excepting the common points,—Concordia.

A. Yes, Concordia.

By Mr. Scott:

Q. Mr. McKinley, your company is in the grain merchandising business, is it not?

A. Yes, sir.

Q. Are there others in Omaha in the same line of business?

[fol. 26] A. Yes, sir; there are a great many.

Q. And do they operate terminal elevators as your company does?

A. Some do and some do not.

Q. There are several who do?

A. Yes, sir.

Q. Now, in the operation of a grain merchandising business of the kind you engage in, is it your practice to accumulate stocks of grain in your elevator and later sell them to buyers?

A. We do that, and we also buy and sell what we call merchandising, supply the trade that needs a particular kind of grain.

Q. Now, you are in competition with the other dealers of the same kind in Omaha, aren't you?

A. Yes, sir.

Q. Now, are there merchants of the same general character as your company in Kansas City?

A. Yes.

Q. And in St. Joseph?

A. Yes.

Q. And in Atchison?

A. That is correct, I believe.

Q. And even in Leavenworth?

A. I think so.

Q. And are you in competition with those merchants in those cities in purchasing grain generally in Kansas and Nebraska?

[fol. 27] A. Yes.

Q. And you are in competition with them, of course, in selling your grain out, I suppose?

A. That is correct.

Q. So you and I can agree that there is a state of active competition in buying and selling grain between all of these points I have referred to?

A. That is correct.

Q. Now, Mr. McKinley, it has been charged here that undue prejudice results from the rates to Kansas City. Why is Kansas City singled out, if you have competitors at these other points?

A. I suppose on account of Kansas City being the larger market, and competition is stronger there. Of course, that would hold true of the other markets that follow along and rely to some extent on Kansas City to set the pace.

Q. And probably because the movement to Kansas City is greater than to these other markets?

A. Well, I don't know that that is really a factor here.

Q. Well, as far as the commercial effect is concerned, you are affected in just exactly the same way, are you not, with respect to the competition of dealers in St. Joseph, Atchison, and Leavenworth, as dealers in Kansas City?

A. Yes; but you generally consider them one and the same, don't you, as Kansas City? They always work together and act together. I think when you say "Kansas [fol. 28] City" you mean the rest of them.

Q. Well, then, you group them all together in your statement; do you?

A. Yes, I think of them as the same.

Q. So it isn't quite correct, then, to just single out Kansas City in this connection? You think of the whole group of markets, don't you?

A. Yes, but particularly Kansas City, because they are more aggressive than the others.

Q. Well, they are larger?

A. Well, competition is a little keener there.

Q. Now, Mr. McKinley, how much of the grain that you buy to place in your elevator at Omaha is consumed in Omaha?

A. Well, the amount that we buy is rather small.

Q. Well, how much? How much of your total handling is eaten by man or beast right here in Omaha?

A. Well, I would say not over a fifth of the grain we handle.

Q. Not over a fifth?

A. No.

Q. You would say not over 5 percent, wouldn't you?

A. That is right.

Q. That is a twentieth.

A. What I am talking about is what we handle through our own company.

Q. Yes, and would be eaten by man or beast in the con-
[fol. 29] fines of the City of Omaha?

A. Well, that is pretty hard to follow that through to the ultimate destination.

Q. You know who you sell to, of course?

A. Yes. Our main selling is outside the Omaha market.

Q. Your great business is to people outside the Omaha market?

A. Yes.

Q. And this grain we are speaking of originating on the Central Branch, when it comes to Omaha as a rule just tarries here for a while and later goes on, doesn't it?

A. Yes.

Q. Now, you referred to the conditions in the early months of the crop movement of winter wheat. There are seasons, are there not, when you are in the market for grain from northern Oklahoma?

A. Well, I don't recall any time that we get any grain from northern Oklahoma. It is rather rare, if we do.

Q. Did you ever buy any from southern Kansas in the early months of the crop movement?

A. No, I don't think so, Walter. I don't recall it. I don't think we could.

Q. Well, now, in some seasons we have seen, haven't we, that Minneapolis mills are large buyers of wheat in Oklahoma and Kansas at that time?

A. Well, that was quite some time ago. They have not [fol. 30] been buyers in this territory for some time, according to my knowledge.

Q. I would agree with you that is because there have been abundant crops in the northwest.

A. That is correct, to some extent.

Q. But in years of light crops in the northwest, then the condition is true that I am referring to, isn't it?

A. It could be true, yes.

Q. Well, it is true?

A. I have seen it.

Q. You have seen a large movement of wheat to the Minneapolis mills, haven't you?

A. Yes, sir, I have. That is why these freight rates are built up, as a rule, so a mill can take care of itself when they have droughts or insufficient supplies in the territories they usually draw from.

Q. That is true. Now, when that happens, that is a very important market factor, isn't it, the demand for wheat from Minneapolis mills and other mills in Minnesota?

A. Well, I don't think it is as important now as it was in the past, because the milling industry has been leaving the northwest to a large extent and centering in different localities.

Q. And because they have had good crops lately?

A. Yes.

[fol. 31] Q. Now, Mr. McKinley, going back to your memory—and I know you have seen many of those years—in years of light crops it is true the movement has been large and a very important market factor, is that right?

A. Yes. Walter, we should bring in here that is when we had transit, too. That was a big factor in that. You must remember that when that was going on, we were not in the exclusive rate break like we are today, so that condition is entirely wiped out at Minneapolis.

Q. Let me call to your mind that in 1936 there was a very short crop in the northwest and a very large movement of wheat from this territory,—do you recall that?

A. I think you are correct on that.

Q. And the present structure of rates was established on July 1, 1935, was it not?

A. You would know. I forget that date.

Mr. Scott: That is all.

Exam. Stiles: No further cross-examination? Any redirect examination?

Mr. Kuhn: No.

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Kuhn: We will call Mr. Conners.

A. M. Conners was sworn and testified as follows:

[fol. 32] Direct examination.

By Mr. Kuhn:

Q. Will you state your name, please, and your business?

A. A. M. Connors, secretary and sales manager of the Maney Milling Company, Omaha, Nebr.

Q. What is the daily production of flour of the Maney Milling Company?

A. At the present time we are producing approximately 3,800 hundredweight, or about 1,800 barrels per day.

Exam. Stiles: You said you are in Omaha, did you not?

A. Omaha, Nebr., yes, sir.

By Mr. Kuhn:

Q. You are somewhat familiar with this case? You have read the petition, have you not, Mr. Conners?

A. Yes, sir; I have.

Q. And what is the particular interest of the Maney Milling Company in it? Is there any particular reason why you want to get out on the Central Branch of the Missouri Pacific?

A. Yes. We find the situation is a question of being competitive in the eastern markets. Flour is sold on a very, very close margin of profit, and where we have a wide territory to draw our wheat from on a competitive basis, it enables us to meet the competitive conditions in which probably 75 or 80 percent of our output is shipped to territories east of the Indiana-Illinois state line, in which the rate from Kansas City to this destination and from Omaha is the [fol. 33] same. So naturally, when seasons are such as they have been, we like to be able to have that wheat come from that territory, especially when the protein is of a big question in making our mill mixtures, to have a competitive price in this eastern territory.

Exam. Stiles: Your shipments to the east are all based on an Omaha combination of rates?

A. Yes, sir. Of course, our rates from Omaha and Kansas City would be the same to the eastern territory. That is the finished product of flour, of course.

By Mr. Kuhn:

Q. Has it been possible for you to secure any wheat from the Central Branch of the Missouri Pacific in late years from which points the rate to Omaha is 6½ cents higher than the rate to Kansas City?

A. Our grain department has been unable to secure that wheat, on account of it being too high a price to grind and then meet the flour competitive price east.

Q. What are the factors that would prompt a sale or a loss of a sale in the matter of price?

A. Competitive prices are so keen in a commodity like flour that even the government buying through the Depot Quartermaster in Chicago, competitive prices run down to a quarter of a cent a barrel, 200 pounds, which would be an eighth of a cent a hundred pounds, at times. Of course, those are extreme, but at various times I have seen a half a [fol. 34] cent in a barrel of flour swing large volumes of business, like with the government at the Depot Quartermaster in Chicago; and of course that is true with the big competitive bakers in the east.

Exam. Stiles: That is a half-cent a hundred pounds?

A. It is phenomenal that they will run that close and lose the business, when you are bidding on competitive business.

By Mr. Kuhn:

Q. Well, in view of that statement, it is very apparent that you can not possibly pay a higher total rate than your competitors at Kansas City.

A. That is very evident, because we are unable to get the wheat from that territory now, and on account of the competitive prices we have got to meet in the eastern markets.

Q. Anything you care to add?

A. Nothing outside of we feel the evidence shown justifies the Commission's giving this very serious consideration, which no doubt it will do.

Mr. Kuhn: That is all.

Exam. Stiles: Any cross-examination?

Cross-examination.

By Mr. Ware:

Q. Mr. Conners, you draw a lot of your grain from territory in northern Nebraska and South Dakota?

A. Naturally.

Q. Is the rate from that territory to Omaha lower than the rate from that territory to Kansas City?

A. I am not here as a rate expert. I won't say anything [fol. 35] about the rates. I am just giving the evidence from the competitive standpoint of delivering the finished product to the eastern markets.

Q. You are just familiar with the situation where the rate is higher to Omaha than from Kansas City?

A. I am talking about delivering flour to the eastern markets. I do not pretend to be any rate expert.

Q. You know what the rates are from Lenora to Kansas City, and the rates from Lenora to Omaha?

A. Only by the exhibits furnished by Mr. Kuhn.

Mr. Ware: That is all, thank you.

By Mr. Scott:

Q. Mr. Conners, what proportion of your output of flour goes east of the Indiana-Illinois state line?

A. It is phenomenal at the present time. I would say it is 80 to 85 percent.

Q. And in a normal time what would you say it would be?

A. It has been building up more and more, on account of the large population and the bigger consumption on the market. It always has been 60 percent or better.

Q. Now, do you have any trade in the State of Iowa?

A. Oh, naturally, but not as much as we do in proportion, in comparison.

Q. Will you name me some cities in Iowa to which you ship flour?

A. The volume is so small, Walter, in Iowa, it is really [fol. 36] not considered by us, it is such a small proportion. The state is divided in numerous small bakeries, so the consumption of flour in the state as a whole is not a big factor with us.

Q. Well, could you just give me two or three points?

A. Oh, Mason City, Fort Dodge.

Q. Mason City and Fort Dodge?

A. Dubuque.

Q. How about Sioux City?

A. Yes, we have in Sioux City.

Q. Sioux Falls?

A. Not in any large quantities, no, not Sioux Falls.

Q. What about southern Minnesota, like Pipestone and places like that, and Albert Lea?

A. In late years, very, very little, and only then when the cars can contain a certain amount of bran and shorts, where that is a big factor in getting the car up there.

Mr. Scott: Thank you. That is all I have.

Exam. Stiles: Any redirect?

Mr. Kuhn: Yes. Just a moment, Mr. Conners.

Redirect examination.

By Mr. Kuhn:

Q. You are sufficiently familiar with the freight rate situation to know that from a tremendous territory in

Kansas and Oklahoma, etc., the rates to Kansas City are 6½ cents lower than the rates to Omaha?

A. That is true.

[fol. 37] Mr. Scott: How does he know that, if he doesn't know anything about freight rates?

Mr. Kuhn: He said he wasn't thoroughly familiar with the rate situation. I want to show to the Examiner and to this Commission where you have a tremendous territory from which to draw wheat, where the rate is 6½ cents less than the rate to Omaha, and we haven't any idea of securing an equalization with you.

Mr. Ware: Mr. Kuhn, since you are testifying, let me ask you the same thing I have asked Mr. Conners: Omaha draws a lot of grain from South Dakota and northern Nebraska?

Mr. Kuhn: Yes.

Mr. Ware: Isn't the rate from that territory to Omaha lower than the rate from that territory to Kansas City?

Mr. Kuhn: Yes, sir.

Mr. Ware: Now, would you like to have the Omaha rate apply to Kansas City from that territory?

Mr. Kuhn: It would be all right, providing we got the Kansas City rate from Kansas and Oklahoma.

Exam. Stiles: Anything more with this witness?

Mr. Scott: No.

Mr. Kuhn: That is all.

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Kuhn: That is all we have, Mr. Examiner, excepting [fol. 38] Mr. Vauck, who has not yet appeared.

Exam. Stiles: Are the defendants ahreeable to going ahead and letting Mr. Kuhn put on his witness later?

Mr. Ware: Yes.

Mr. Kuhn: That is all we have, excepting him.

Mr. Ware: How do you spell his name?

Mr. Kuhn: V-a-u-c-k (spelling). He is traffic manager of the Farm Crops Corporation, a new industry in Omaha during the past year.

Mr. Ware: Mr. Kuhn, I neglected to ask you, if I may, you are only representing the Omaha Grain Exchange and its members?

Mr. Kuhn: Yes, sir.

Mr. Ware: And all of those members, are they located here in Omaha?

Mr. Kuhn: Some of them have headquarters in Kansas City.

Mr. Ware: Well, they all have mills here at Omaha?

Mr. Kuhn: Yes, sir.

Mr. Ware: Mills or elevators here at Omaha?

Mr. Kuhn: Mills or elevators; yes, sir.

Exam. Stiles: The defendants may proceed.

Suspend the record while we mark the exhibits.

(The exhibits referred to were marked as defendants' exhibits Nos. 7 thru 28, Witness Bindner, for identification.)

Mr. Ware: Mr. Bindner may take the stand.

[fol. 39] C. J. Bindner was sworn and testified as follows:

Direct examination.

By Mr. Ware:

Q. State your name and address.

A. My name is C. J. Bindner. I am located at Room 1810 Missouri Pacific Building, St. Louis, Mo.

Q. That zone is 3?

A. Zone 3.

Q. By whom are you employed, and in what capacity?

A. I am employed by the Missouri Pacific Railroad (Guy A. Thompson, Trustee), in the capacity of general freight agent.

Q. And as general freight agent, what are your duties?

A. My duties in connection with my present occupation are the handling of formal proceedings before the Interstate Commerce Commission, tariff interpretations, claim matters, and matters of a similar nature.

Q. Have you been employed in the traffic department of the Missouri Pacific for many years?

A. I have had over 25 years' experience in the traffic department, dealing with tariff matters, tariff construction, rate proposals, and commerce work, before the Interstate Commerce Commission and various state commissions.

Q. Are you familiar with the issues involved in this case, Mr. Bindner?

A. I have made a study of the complaint, and believe I understand the issues in the proceeding.

[fol. 40] Q. And is the position of the Missouri Pacific, generally speaking, in opposition to the complaint?

A. Our position is in opposition to the complaint.

Q. Now, in that direction, have you prepared some exhibits which are germane to the issue here?

A. I have, and they are the exhibits which we have marked for identification as exhibits Nos. 7 to 28, inclusive.

Q. Now, were those exhibits prepared by you or under your supervision and direction?

A. They were.

Q. And are they correct, to the best of your knowledge and belief?

A. They are.

Q. Mr. Bindner, will you take up your exhibit No. 7?

A. Exhibit No. 7 is simply an index, In most instances, the data which are shown on the exihibts which so show the points which I have used therein, in most instances are in geographical order; and this exhibit 7, showing the points in alphabetical order, has an index number affixed to each point for ready reference in case they should be necessary in discussing the exhibits.

Exam. Stiles: Are those index numbers something that appear in the tariff?

A. They do not. They are just simply an index that I [fol. 41] have made to fit in with the exhibit.

By Mr. Ware:

Q. These are all origin points on the Central Kansas Division of the Missouri Pacific, are they not, Mr. Bindner?

A. The points shown on the exhibit are the origins which the complainant has covered in the complaint, and in addition thereto, the origins on the line of the Missouri Pacific running westward from Atchison for that portion east of Concordia which were not specifically covered by the complaint.

Q. What is your exhibit No. 8?

A. Exhibit No. 8 is a map showing in black the line of the Missouri Pacific. The territory involved is on that line extending due west out of Concordia to Lenora and Stockton, Kan., with several branches,—one out of Jamestown to Burr Oak, and one out of Yuma to Warwick, Kan. Shown in the map, too, is the line of the Missouri Pacific from Atchison northward to Omaha, Nebr., South Omaha, which, in addition to Council Bluffs, are the destination points in issue in this case. It will be noted from the map that the Missouri Pacific has a single through line from the grain-producing territory here in issue west of Concordia through Atchison, clear through to Omaha. While the exhibit does not show, later exhibits will show that the Missouri Pacific from this territory west of Concordia has the shortest mileage to Atchison.

[fol. 42] Shown also on the exhibit is the line of the Rock Island, in blue. It will be noted that from the territory west of Concordia, the line branches, one branch going to Omaha, anothe- to Kansas City.

The red pencil line indicates the line of the C. B. & Q. Railroad, and the map will indicate that there is a branch running from Concordia to hook up with the main line paralleling the Kansas-Nebraska border. Off this line there are three outlets to Omaha, as indicated on the map.

Shown also in green pencil is the line of the Union Pacific Railroad.

In looking at this map, it should not be forgotten that the Missouri Pacific in reaching Omaha goes through Atchison, Kan., which is a primary market point and a rate-break point within the meaning of the Commission's decision in the Grain Case, 17000, Part 7. It will be also noted by looking at the map that neither the Burlington nor the Rock Island, in serving Omaha or Kansas City from the territory here involved, goes through Atchison in a similar manner.

By Exam. Stiles:

Q. Is the Commission to understand from your statement, then, that while the Rock Island line which parallels your line west of Concordia applies the same rates to Kansas City and to Omaha, your company declines to do that because of distance?

A. No, sir. I specifically mentioned rate-break to indicate how the rates are made, as my later discussion will [fol. 43] bring out.

Q. Does Atchison take Kansas City rates?

A. Yes, sir; it does.

Exam. Stiles: Proceed.

A. Distances from the origins named to Omaha will appear in later exhibits.

By Mr. Ware:

Q. Mr. Bindner, Mr. Kuhn used a distance of 336 miles from Lenora, Kan., to Omaha, over the route of the Missouri Pacific to Concordia, thence the Burlington beyond. Now, do you know over what one of the three possible routes of the Burlington from Concordia to Omaha is that distance figured?

A. In answering that question, I should like to refer to exhibit No. 9, which I believe will show the Burlington situation from Concordia in a little clearer light. This exhibit is a map of the Burlington Railroad. The mileage used by Mr. Kuhn, as I understand it, is that via the route of the Burlington from Concordia over their secondary branch line from Concordia to Odell, thence eastward to Wymore, thence north to Crete, through DeWitt, then through Lincoln to Omaha.

Q. Now, is the distance over the other two possible routes of the Burlington greater than that?

A. Yes, sir; they vary in degree. The distance via the line through Table Rock-Lincoln is somewhat greater than that, and that through Napier in Missouri up the east bank is still greater.

[fol. 44] Q. Now, what is exhibit No. 10?

A. In approaching exhibit No. 10, I believe it pertinent to deal briefly with the history of the railroad, or the line of railroad we are treating of. All the origins in the complaint, as well as those east, are located on that portion of the Missouri Pacific Railroad that is known as the Northern Kansas Division, more familiarly known as the Central Branch Union Pacific Railway Company.

Q. Missouri Pacific, that is?

A. No, Union Pacific. This line consists of properties which were constructed over a period of years, beginning in 1865 with the Atchison & Pike's Peak Railroad, which railroad acquired the rights of the Hannibal & St. Joseph Railroad Company with government aid for 100 miles west from the Missouri River, and after 40 miles of road had been built westward from Atchison, Kan.

By January 1867, the name of the company was changed to Central Branch Union Pacific Railroad Company. This latter company completed construction of the remaining 60 miles westward to Waterville, Kan., on January 20, 1868.

The tracks were gradually extended westwardly by other companies, such as The Waterville & Washington Railroad Company, 20 miles to Greenleaf and Washington, 1867; The Republican Valley Railway to Concordia, 42 miles, 1877-1878; The Atchison, Solomon Valley & Denver Railway Company to Cawker, 48 miles, 1879; then skipped [fol. 45] to Downs and extended to Alton, 24 miles, 1879; and so on by degrees and through the incorporation of various companies, completed the line as it is known today, same having been completed in the year 1888, and consisting of 383 miles of track.

In 1898, the Missouri Pacific acquired the capital stock of the Central Branch Union Pacific Railway, and the capital issues of the rest of the properties were acquired the year following. In 1909 these various companies were merged to form the Missouri Pacific Railway Company, although prior thereto certain portions of the line were being operated by the Missouri Pacific, under lease.

While it was the original intention to have the line extended as a through line to Colorado, that hope never materialized, and it is apparent that the present position of the Central Branch of the Missouri Pacific structure is as a feeder line for the Missouri Pacific, located in a territory that is predominantly agricultural.

Now, getting to exhibit No. 10, I have shown thereon the traffic density of the line for a period of years 1939 to 1945, inclusive. This line is known as a light-density line, that is, the traffic handled thereon is below the maximum which it is capable of handling in its operation.

The figures for 1939 and 1940 were shown because I felt that those years represented a more nearly normal pe- [fol. 46] riod than did the years during the peak war traffic.

Now, the comparison of a normal year, for instance, 1939, with 1945, will show that on the eastbound traffic, which is the heavier of the two as to direction, that is, eastbound versus westbound, that in 1939 there were 35 million-plus net tons handled per 1 mile, as contrasted with almost four times that volume in 1945, when the net tons handled was in excess of 120 million.

Now, this, in my opinion, shows a very material margin in the ability of the Missouri Pacific to handle traffic.

Under Column C there are some slight variations in distances, brought about by slight changes in the line. Under line 5 it will be noted that the line embraces the segment from Yuma to Hastings, whereas in prior computations the figures included the line from Yuma to the end of the branch, at Prosser, Nebr.

Q. Mr. Bindner, you covered the war years there, too?

A. Yes, sir.

Q. Now, was there considerable wartime traffic which moved over parts of that line?

A. There was considerable wartime traffic.

Q. And where was that?

A. Well, mostly from the naval plant at Hastings. That contributed a material increase in the tonnage. But I think as on every other portion of our system lines, the war [fol. 47] years showed an increase in tonnage.

Q. Take up your exhibit No. 11.

A. Exhibit No. 11 is introduced to make a comparable showing of the density of the northern Kansas division with that on other portions of the Missouri Pacific system. It shows, I believe, that that portion of the Missouri Pacific system lines is one of the lightest of the system.

Q. Now, will you indicate for those here present the line involved in this proceeding on that map?

A. That is the extensive east-and-west line in the upper left hand corner of the diagram.

Q. Take up your exhibit No. 12.

A. Exhibit No. 12 shows the movement of grain, separated as to kinds, in carloads from the various points in the territory west of Concordia for the years 1941 to 1945. It will be noted that wheat of the various grains predominates in volume. The points are shown in alphabetical order.

By Exam. Stiles:

Q. Just a moment, before you leave this. Is this carloads?

A. Yes, sir. I stated in the record it was carloads.

Q. It is grain which originated at these points, shipments which originated at these points?

A. Those were shipments which originated and were shipped out of those points via the Missouri Pacific.

Exam. Stiles: Proceed.

[fol. 48] By Mr. Ware:

Q. Now, is your exhibit 13 a sort of a companion to exhibit 12?

A. Like exhibit 12, 13 shows similar information for the same period, ~~but shows~~ it for the portion of the Central Branch, Concordia and east. The figures on that exhibit, too, are in carload quantities.

Q. Then you take the exhibits 13 and 12 together, and you show that the heaviest grain movement is from points west of Concordia?

A. I think it shows that the movement of grain from the territory west as a region is materially greater than that from the territory east of Concordia.

Q. Now, will you take up your exhibit No. 14?

A. Exhibit No. 14 shows the movement of all commodities or all traffic out of points on the Missouri Pacific west of Concordia, broken down as to principal items,—wheat, corn, other grains, hay, and livestock, which are the principal commodities. All other commodities shipped out of points on that portion of the railroad appear under Column H as

"Miscellaneous." These figures are shown for the year 1945.

Under Column B I have shown the extent of the haul on the Northern Kansas Division. For instance, under opposite line 1, Lenora, where Atchison is shown, it is an indication that the tonnage was transported from Lenora over the entire division to Atchison, whereas the figures opposite [fol. 49] Clyde indicate that the traffic came to a rest at Clyde; and those opposite Beloit show the traffic was interchanged or came to a rest at that point.

By Exam. Stiles:

Q. In other words, Column B is not necessarily the destination of the shipment?

A. Only in so far as the division is concerned.

By Mr. Ware:

Q. Now, is there a mill or an elevator at Clyde?

A. There is a mill located at Clyde.

Q. Isn't it possible that all of that wheat which you show that moved to Clyde was transited and reshipped from that point on to Kansas City over the Missouri Pacific?

A. I know most of it had been handled in that manner.

Q. Yes.

A. Now, on page 2 of the exhibit, I have shown a summary of the various items preceding that. It will be noted that the number of cars of grain shipped out total 6,414, or about 80 percent of the entire tonnage shipped out from those points. Livestock was next in importance, with 1,289 cars, mostly all of which was cattle, and hay accounted for 208 cars. The remaining 136 cars were miscellaneous items,—17 cars of rock from Cedar, Kan., to Moser, Mo.; the 20 cars from Osborne consisted of 4 cars of eggs and 16 of seed, which went to eastern destinations; the 54 cars from Beloit consisted mostly of mill products; and in addition to that, there was but 1 car of grain bins out of Scottsville.

[fol. 50] Q. It shows that that line is pretty much dependent upon its grain movement, does it not, Mr. Bindner?

A. I believe it clearly shows that.

Q. Is that a complete traffic study, that is, of all the commodities?

A. That covers every car we have a record of for the year 1945.

Q. Take up your exhibit ~~No. 15.~~

A. Exhibit No. 15 shows similar information in the reverse direction,—that is, the number of cars received at the same destinations. During the period 1945, that is. Like the other exhibit, it shows the entire tonnage.

Now, it will be noted that Solomon Rapids figures are not shows. That was due to the fact that there were no shipments into Solomon Rapids in 1945. In previous years, the tonnage inbound amounted to one to four cars only.

Sherdahl was not included because there was no record of inbound movement.

Turning to the last page, it will be noted that the inbound movement amounted to only 1,967 cars. When coupled with the outbound movement shown in exhibit No. 14, it will be observed that the total tonnage amounted to 10,014 cars.

Q. Mr. Bindner, now, the miscellaenous shipments handled westbound, did you give what they consisted of? Have you got that?

[fol. 51] A. Well, I have a record of all inbound movements under the miscellaneous column, but I didn't want to burden the record with them. I could give you an idea of what they are.

Q. Just name a few of them, if you can.

A. Well, I will take some of the larger items. Beloit, on page 3, index 23, there were 101 cars of miscellaneous freight, 41 of which were fruits and vegetables, and the balance consisted of scrap iron, machinery, soap, mill products, and some building material.

Q. Now, all of those miscellaneous products were handled in carloads, the same as the other cars?

A. They are all handled in carload lots.

Q. Take up your exhibit 16.

A. Exhibit No. 16 shows in a manner similar to that used in exhibit No. 15 the tonnage consists of the line for the points Concordia and east to, but not including, Atchison. Parnel was not shown, since those figures are reported, as I understand it, at the Atchison agency, and I was not in a position to secure them in time for the proceeding.

Q. Parnel, Kan.?

A. Yes, sir.

Q. All right.

A. Opposite Concordia, index 28, there is a miscellaneous item of 393 cars, which consisted of sand and gravel going to various points, mostly short-haul low-earning traffic. [fol. 52] Then opposite Clyde, which I believe responds to your inquiry before, there are 394 cars of miscellaneous freight, consisting mostly of mill products, flour, and other products.

Linn, Kan., index 44, has a large item of miscellaneous traffic, 188 cars, consisting mostly of eggs and poultry products. The 67 cars out of Blue Rapids was in the main mill products.

Now, on sheet 2, the totals, as in the other exhibits, show what the total tonnage was. In this instance, the outbound tonnage from these points was 3,424 cars.

Q. Did you say 24?

A. 3424 cars.

Q. Mr. Bindner, do you show the distances from these points on exhibit 16 to Atchison in another one of your exhibits?

A. Yes, I do. Those distances to Atchison appear on exhibit No. 23.

Q. And were many of those hauls from those origins on 16 to Atchison short hauls?

A. Yes. Take Muscotah, index 65, there were perhaps 85 to 90 cars on which the Missouri Pacific's participation in the division was 25 miles; or at Frankfort, 78 miles, there were about 125 cars.

Q. Now, take up your exhibit No. 17.

A. Exhibit No. 17 shows the inbound tonnage at these points Concordia and east. I think it explains itself pretty [fol. 53] well, except that the 232 cars opposite Concordia, index 28, as miscellaneous freight is mill products. The other large item of 213 cars opposite Clyde might appear a little confusing, since under Column B it indicates the haul is to Atchison, but I believe inspection will clarify this, since the asterisk, as explained at the bottom of the page of the exhibit shows that one car of some kind of freight came from Atchison, whereas the balance of 213—it should be 212—cars consisted of wheat from points over west of Concordia.

Q. That should be 212 instead of 213, on page 1 of exhibit 17, in the footnote?

A. Yes.

Exam. Stiles: Suspend the record. The reporter may make the change in the official copy.

By Mr. Ware:

Q. Now, Mr. Bindner, when you take exhibits 12, 13, 14, 15, 16, and 17, then you have a pretty complete traffic picture of this branch line all the way west to the far extreme, Lenora, both eastbound and westbound?

A. Yes.

Q. And it shows it is predominantly a grain line?

A. It shows that.

Q. And most of the grain is produced in the territory at points west of Concordia, is that correct?

A. That is correct.

Q. And would you say that this line from Atchison to [fol. 54] Concordia is dependent largely upon the grain traffic which it gets from those points west of Concordia?

A. I think it relies very largely upon that grain, and in a secondary degree on the livestock, which amounted to almost 1,300 cars.

Q. Now, take up your exhibit 18.

A. In discussing that exhibit, I believe we should bear in mind that, in considering a proposition to establish a route via the Missouri Pacific-Concordia, Kan.,—C. B. & Q., as proposed by the complainant, we are dealing with grain that originates at local points on the Missouri Pacific Railroad, is destined to a market which the Missouri Pacific serves with a single line of railroad; and in approaching that proposal, I believe we should inquire if the principal single-line haul of the Missouri Pacific is unduly long as compared with that of the route proposed.

I believe that this exhibit answers that inquiry. It first shows the distance via the Missouri Pacific direct, under column D. Under column G, the exhibit shows the mileage via the proposed route through Concordia.

Q. Thence C. B. & Q.?

A. Thence C. B. & Q., which, as column H indicates, is

113.4 miles, the difference being in favor of the proposed route. This is translated into percentages under column I.

Exam. Stiles: That 113.4 miles is 33.7 percent of 449.5 [fol. 55] miles?

Mr. Ware: No.

A. Let's see. I didn't get your question. I was looking at something else, Mr. Examiner. Pardon me.

Exam. Stiles: It is that percent of the 336.1 miles, isn't it?

A. Column I is the percent that the Missouri Pacific's haul to Concordia——

Mr. Ware: Wait a minute on that.

A. No, I am a little off on that. Let me explain it this way: What the exhibit intends to show is, first, that the Missouri Pacific has a route from the origin territory to Omaha. These mileages are shown under column D. A route is proposed from the same points to the same destination via Concordia, which distances are shown under column G, and column H shows that that difference, column G versus the column D route, is 113.4 miles, and those percentages thus show the ratio of those hauls. And what I was endeavoring to show there was that the present haul of the Missouri Pacific is not unduly circuitous as compared with a haul via Missouri Pacific-Concordia-Burlington, if such a route existed.

Exam. Stiles: Well, for that you rely on column J?

A. No, I don't. In column J I have endeavored to show the ratio of the Missouri Pacific's haul from the origin to Concordia as proposed with the entire haul via Concordia of [fol. 56] the Burlington to Omaha. In other words, if the Missouri Pacific were compelled to engage in a route via Missouri Pacific-Concordia-Burlington, we would be short-hauled on traffic which we originate.

By Mr. Scott:

Q. Mr. Bindner, that 33.7, is not that the percentage of circuity of the Missouri Pacific's own line in relation to this route through Concordia of the Burlington?

A. Yes, sir; that is what I tried to explain.

Q. You divide 113.4 by 33.1?

A. That is right. I hope I have that clear on the record, because we are relying a lot on this showing.

Exam. Stiles: Now, this column J is based on what,—the relation of column E to column G?

Mr. Ware: E to G, E versus G.

A. That is right.

By Mr. Ware:

Q. Take that from Lenora on page 1 of exhibit 18, and that 41 percent in column J. Now, if the Missouri Pacific hauled the traffic from Lenora to Omaha over its single line via Atchison, it would get 100 percent of the haul, would it not?

A. That is correct.

Q. If the proposed route Missouri Pacific to Concordia, Kan.—Burlington should become the established route, such as Mr. Kuhn seeks, then the Missouri Pacific would only get 41 percent of the haul instead of 100 percent, is that correct?

[fol. 57] A. The Missouri Pacific's participation in the haul from Lenora to Omaha through Concordia, comparing its haul to Concordia with the through haul via Concordia and the Burlington, would be 41 percent. In other words, Mr. Examiner, this column J shows what our participation would be in the proposed route if it were ordered, not in our present route, but in the proposed route.

Exam. Stiles: And this complaint does not attack the rate over the Missouri Pacific direct to Omaha.

A. Is that a question to me?

Exam. Stiles: That is a statement of fact.

A. Well, in concluding the exhibit, I would like to point out that under column J the ratio of our haul to the total proposed haul would range from 2.4 percent to 41 percent, or an average of but 21.7 percent.

By Exam. Stiles:

Q. The degree of circuity of the single-line haul of the Missouri Pacific runs as high as 57.2 percent?

A. Yes, sir; but the average is 44.8, something under the 50 percent the Commission has used in dealing with matters involving circuity for distances of this nature.

Q. Under the Fourth Section?

A. Yes, sir.

By Mr. Ware:

Q. Take up your exhibit 19.

A. Under the proposal, which would have us give up this local grain at Concordia, our haul to Concordia as compared [fol. 58] with our through single-line haul from the origins to Omaha would range from 1.1 to 30.9 percent, as shown under column D, or an average of but 15.3 percent.

I have shown on there certain data under columns E and F which do not, after I look at them, appear particularly pertinent here, and they may be disregarded.

Exam. Stiles: Which is that?

A. The data under columns E and F.

Mr. Ware: On exhibit 19.

Exam. Stiles: Is that a request to strike those from the exhibit?

A. Well, I didn't ask that they be stricken. I just felt they weren't pertinent, Mr. Examiner.

Mr. Ware: Leave them in, Mr. Examiner. We might find some use for them.

By Mr. Ware:

Q. Now, what is your exhibit 20, Mr. Bindner?

A. Exhibit No. 20 is a history of the rates on grain from July 31, 1931, to the present time. I have shown as origins the points west of Concordia, and destinations under the column headed "To", "A" indicating the destinations of Atchison, Kansas City, Leavenworth, and St. Joseph, and "O" destinations of Omaha and South Omaha.

As to the situation on grain on the Missouri Pacific system and other lines, the Missouri Pacific does not anticipate any joint rates on grain from the producing territory served by [fol. 59] it to the primary markets or rate-break points. An exception, as pointed out by Mr. Kuhn, has been made to this practice in connection with the rates from points in Nebraska on the Prosser branch, as well as Republic and Warwick, Kan., on the same line.

On July 31, 1931, which is the date prior to that on which the rates became effective under the decision of the Interstate Commerce Commission in docket 17000, part 7, 164 ICC 619, rates from the Central Branch or Northern Division points to lower Missouri River points, St. Joe, Atchison, Leavenworth, and Kansas City, were published on a split basis, the rates on wheat being in most respects 2 cents per 100 pounds higher than on corn. The rates to Omaha reflected a spread of 8 cents over those to the lower river cities, in most instances. In a few cases, the spread was 8½ cents.

Now, these rates appear under column 1. On August 1, 1931, in compliance with the decision in the first Grain Case, the rates on wheat to Kansas City were reduced in amounts approaching from 2 to 3 cents, and the wheat basis was applied to corn and other grain. In every instance, the new basis was lower than the old corn rate. The rates thus published were those specifically set out on page 804, volume 164, from Beloit and Concordia, Kan., and under a basis set out on page 664 of the same volume from the country points of origin. Rates to other lower Missouri River cities were [fol. 60] placed upon the Kansas City basis, to preserve the grouping of those cities which had been maintained for many years. The rates to those cities thus published were somewhat lower than the interior mileage scale prescribed by the Commission. The Fourth Section would have compelled the observance of the Kansas City rate at those intermediate points, even though there was not that desire to maintain a long existing parity.

The Commission did not prescribe rates from Kansas points to Omaha, and when the rates were readjusted, they were made 6 cents over the rates to Atchison. 6 cents was the measure of the specific proportional which the Commission prescribed in Appendix D from Omaha to Kansas City, and it was felt that that was a proper basis to apply in the reverse direction. Now, those rates are shown under column 2.

Under column 3, it will be noted a readjustment was made in the rates from these origins on the Kansas City basis to Omaha, Nebr., effective August 22, 1931, and that that adjustment was set aside when the Supreme Court set aside the grain decision, which resulted in the restoration of the

July 31, 1931 rate, effective February 20, 1932, as shown under column. 4. Now, when these rates were revised, effective August 22, to the Kansas City basis to Omaha, there was some doubt in the minds of the Missouri Pacific people as to what was required under the decision in the Grain Case. They were not sure whether that was compelled or not, but that misunderstanding was later straightened out [fol. 61] when the court set the case aside.

Effective July 1, 1935, the rates appearing under column 5 were those to conform with the second decision in the Grain Case.

Q. What is that citation?

A. 205-301.

There it will be noted that the rates were constructed on the basis of the Atchison rate plus the proportional rate of 6 cents.

Following that, we had some protests or requests, particularly from grain people out on the Central Branch, asking for some revision in rates, and that request sought rates based on the 6 cents under the rates which we had on effect, or down to the Kansas City basis. After some consideration, it was decided to publish rates, not on 6 cents under, but rather 3 cents under, and those rates appear under column 6, effective July 3, 1936. The unfortunate part of that publication was that it was a voluntary readjustment in rates, made without public docketing, without notice to the public, and in that way all of the facts, all of the opposition was not developed thereto, and when very serious objections were recorded, the management felt it necessary to restore the old basis, which was done on short notice by the grant of authority requested to do so on such short notice by the Commission.

Exam. Stiles: Then the reduction shown in column 6 [fol. 62] never became effective?

A. Those rates never became effective.

The next change is that shown under column 8, which is the increase brought about by Ex parte 123, with a slight change made therein in the rates on July 15, 1938, shown under column 9, brought about by correcting an oversight in placing the Ex parte 123 increase of ½ cent to the 6-cent proportional rate into the making of the through rate based on the Atchison combination.

Then under column 10 we show the present rates.

Now, on the last page of the exhibit, under column 8, it will be noted that opposite index 36 and index 37, Republic and Warwick, there is a rate of 20 cents, prefixed with reference asterisk. This rate applies via Superior, C. & N. W. or Superior, C. B. & Q. Railroad, and is 3 cents over the Kansas City basis. The 20-cent rate is the old 19-cent rate established on July 13, 1936, on wheat, and August 8, 1936, on other grains, increased by 1 cent under Ex parte 123.

By Mr. Ware:

Q. Mr. Bindner, has there been any movement from Republic or Warwick?

A. That was put in, that rate was put in effect at that time to take care of a special movement, which I think was 20,000 bushels. I am not sure whether that movement materialized, but I do know that our records show that since that time, since 1936 there has not been a pound of [fol. 63] grain moved to Omaha thereunder.

Q. Where was that special movement which made it necessary——

A. As I recall it, it was to take care of a movement to Minneapolis or Duluth, I am not sure, but it was in that territory.

Q. Now, when that route via Hastings, C. & N. W. was canceled out, how did it happen that you established a new route via Superior, if you know?

A. I was a little surprised to see that, because when the C. & N. W. removed their line to Hastings——

Q. There was an abandonment?

A. There was an abandonment. The rate would have gone out with it, but it was brought forward via these other routes, because in making any changes in rates in these days, particularly where an increase was shown,—and that would have been a technical increase,—it is necessary to make a report to the OPA or call their attention to it, and it was felt not desirable to do that.

By Mr. Kuhn:

Q. Well, as a matter of fact—I want to see if I can't get him straightened out. As a matter of fact, the Commission set the rate from Hastings to Omaha, did it not?

A. From Hastings?

Q. Yes, sir; in 205.

A. I am not talking about Hastings.

Q. Well, Superior; either one.

[fol. 64] A. I was just talking about Warwick, Kan., and Republic, Kan., only those two points.

Mr. Kuhn: Oh, I see. I thought you were talking about Hastings and Superior.

By Mr. Ware:

Q. Mr. Bindner, when if you know did the C. & N. W. abandon that route at Hastings?

A. That abandonment was—I might be wrong about this, but I think in the latter part of 1943.

Q. Anyhow, it was during the period when you were required to give the OPA notice of any increase you made, is that right?

A. Yes.

Q. During that whole period, Mr. Bindner, as covered by your rate history from July 31, 1931, there has been an 8-cent or 6-cent differential Omaha over Atchison, except for a short period, August 22, 1931, to February 20, 1932, has there not?

A. There has been.

Q. Will you take up your exhibit——

A. I might say that we, to my knowledge, have not received any complaints about that situation from any of the grain growers or grain interests in the origin territory.

Exam. Stiles: Mr. Ware, is the witness through with Exhibit 20 now?

Mr. Ware: I just want to ask him one question on it, Mr. Examiner, if I may.

By Mr. Ware:

Q. Mr. Bindner, you only referred to the rates from [fol. 65] Warwick and Republic which are located on the

Missouri Pacific branch extending from Yuma to Prosser, shown on your exhibit 8. Now, do we maintain any joint rates from the Nebraska points on that branch to Omaha?

A. Yes. I believe I stated that before, that we do have some joint rates from the Prosser branch Nebraska points to Omaha.

Q. Now, why do we maintain those joint rates?

A. Well, I think there is a little compulsion to do that, starting out with—I think it was the outgrowth of the Nebraska Commission's decision dated July 30, 1931.

Q. And what did that require?

A. I don't know all the details, but I do know that they did order in rates via the Missouri Pacific for joint-line application via specific prescription.

Q. And that was not a voluntary situation on the part of the Missouri Pacific?

A. No, sir; it was not.

Mr. Ware: That is all on that exhibit now, Mr. Examiner.

Exam. Stiles: We will recess until 1:15.

(Whereupon at 12:05 p. m. a recess was taken until 1:15 p. m. of the same day.)

Afternoon Session, 1:15 p. m.

Exam. Stiles: Let us come to order, please. You may proceed, Mr. Ware.

[fol. 66] C. J. Bindner resumed his testimony as follows:

Direct examination (Continued).

By Mr. Ware:

Q. Will you take up your exhibit 21, Mr. Bindner?

A. Exhibit No. 21 is a comparison of the rate districts—there are three of them, the 17-cent, 18-cent, and 19-cent origin groups, in which territory points on the Rock Island and Missouri Pacific are embraced.

Column B shows the mileages of the Missouri Pacific-Concordia-C. B. & Q.; column E those via the Rock Island single line from common points of Scandia and Mankato and cross-country points.

It will be noted that on the 17-cent group there is a difference of 54 miles; the 18-cent group, 53; and the 19-cent group, 49 miles.

By Exam. Stiles:

Q. What did the Commission conclude on this, that distance is not at all a controlling factor in making these rates?

A. Is not a factor?

Q. Not at all a controlling factor.

A. Well, I think distance has some place in the consideration of these matters. Another consideration is the fact that the Missouri Pacific with the "Q" would be a two-line haul.

By Mr. Ware:

Q. What is your exhibit 22?

[fol. 67] A. Exhibit 22 is a similar comparison with the same points, based on the Missouri Pacific single-line mileage into Omaha. There the distances are materially greater, being somewhat around 167 miles.

Q. Take up exhibit No. 23.

A. On exhibit No. 23 I have shown the present rates on grain from points on the Missouri Pacific east of Concordia, the territory through which the grain from the western portion of the line moves.

Q. Handled via the Missouri Pacific direct?

A. Handled via the Missouri Pacific direct. The exhibit shows the distances about which you asked the question this morning. The exhibit shows that if the rate were established from a point such as Yuma on the basis of 16 cents, there might be some agitation for the same basis via the single-line, and if that were brought about, if revision were brought about on that basis, the Fourth Section would necessitate holding that 16-cent rate back to and including Whiting, index 64.

Q. Isn't that Muscotah instead of Whiting?

A. Muscotah, pardon me. That is index 65.

By Exam. Stiles:

Q. On this exhibit 21, the distances from the Missouri Pacific stations, are they the Missouri Pacific single-line distances?

A. No, sir; those are the proposed distances through Concordia and C. B. & Q.

[fol. 68] Q. The exhibit doesn't show that.

A. I thought I made that clear in my testimony.

Exam. Stiles: Go ahead.

By Mr. Ware:

Q. You mean these are the proposed distances?

A. Yes, sir; these are the proposed distances.

By Exam. Stiles:

Q. On exhibit No. 22 those Missouri Pacific distances are——

A. Via the single line through Atchison.

Q. These are the single-line distances?

A. Yes, sir.

Exam. Stiles: Go ahead.

By Mr. Ware:

Q. Just where is Yuma located, Mr. Bindner?

A. That is the first station west of Concordia.

Q. Take up your exhibit 24.

A. By the same token, a similar revision would be necessary in the rates from the points west of Concordia to intermediate points in Nebraska,—that is, points intermediate to Omaha. This exhibit 24 shows the present rates from the points west of Concordia, and the rates shown thereon apply to Omaha as well as the Nebraska territory intermediate thereto shown in the heading in the exhibit.

I have also shown on the exhibit the rates from points Concordia and east to those Nebraska destinations.

By. Exam. Stiles:

Q. Mr. Bindner, in several of your exhibits you have given distances, but I do not notice any tariff authority for [fol. 69] them. Is there any one of the exhibits that does have the tariff authority for the distances?

A. Well, that should be placed in the record.

Mr. Ware: May we, Mr. Examiner, furnish authority for the distances a little bit later?

Exam. Stiles: You may do that. And also, these exhibits that show rates do not show the tariff authorities for the rates.

A. That will be supplied.

Exam. Stiles: Some of them do; but if the ones that do not are not covered by some exhibit that does show the authority for that rate, please put that in the record.

A. I think you will find the tariff authorities are pretty well covered, but I will straighten that out.

Exam. Stiles: Very well.

By Mr. Ware:

Q. Do you have anything further on that exhibit, Mr. Bindner?

A. No.

Q. Take up exhibit No. 25.

A. The tonnage figures I placed in the record before indicated that on the outbound tonnage from this territory there were three groups of tonnage grain, about 80 percent; and perhaps about 1,300 cars of livestock, which consisted chiefly of cattle; and, oh, several hundred cars of hay. And with that in mind, it was interesting to note just what the [fol. 70] rate situation was on the tonnage that actually moved out of there in volume, so I made a study of the hay rates to start with, and the result of that study is shown on exhibit 25. There it will be seen that in connection with the grain adjustment to Omaha as against that to lower Missouri River cities, there is a difference in rates, the Omaha rates being in all instances higher than those to Kansas City or Atchison.

On that exhibit the tariff authority has been shown.

Q. Is exhibit 26 a similar exhibit?

A. Well, 26, 27, and 28 show the situation on livestock in a similar manner.

By Exam. Stiles:

Q. Were these rates on livestock the ones that were prescribed in No. 17000, part 9?

A. Well, I think the general basis is the 17000, part 9, but there might be some changes.

Q. So that those are almost strictly distance rates, except where they are varied by making groups?

A. No, I think there is some little change going down to Kansas City and Atchison.

Q. They are varied somewhat by making groups, and using the influence of the market?

A. There is also the influence of the Kansas state feature.

Q. Aren't the Kansas state rates on the same basis as the interstate rate?

A. Not in all instances.

[fol. 71] Q. Well, if this is an adjustment that is primarily based on distance, you wouldn't say it would be controlling of what the situation should be in the grain rates, would you?

A. No. To the first portion of your question, it isn't entirely based on distance. Second, I have shown these rates because they are the rates which actually moved that tonnage which we talked about. Now, there is some of this tonnage—I haven't got it broken down as to destination—that did move to Omaha. I am speaking of livestock.

Q. Well, my own impression is that they are practically in accordance with the distance scale, and if that is not correct, I would like something more than just the general statement that you made that there are instances where they are not. As an adjustment, aren't they on the distance scale that was prescribed by the Commission as brought down to date? As you run down the line there, these points are geographically stated, are they not?

A. Yes, sir; they are on a distance scale prescribed by the Kansas commission, but that differs in some instances from the interstate prescription.

Q. But you have no statement to make as to the extent as to which it differs?

A. No, I haven't made a study of that. I just took the rates as they were.

Q. It just appears to me that in those exhibits you are [fol. 72] taking the adjustment that is primarily a distance adjustment, and offering it as support for a spread in rates in a grain adjustment which is not primarily a distance adjustment. If that is correct, I think the same would be true of the hay rates. Were not the hay rates also on a distance basis? As prescribed by the Commission, those rates were——

A. I am not too sure just what that basis is for those hay rates. I just took the rates as they were, because those were the commodities which were actually moving out of that territory, and the only commodities.

Q. You don't know whether those hay rates were related to the livestock rates?

A. They were not related, I know that.

Q. Were they related to class rates?

A. No, I don't think so.

Exam. Stiles: All right.

A. That is all I have, Mr. Ware.

Mr. Ware: I think that is all on direct examination, Mr. Examiner.

A. Except I want to supply those authorities where they are missing.

Mr. Ware: Yes. We will have to furnish that a little bit later. I should like to offer Witness Bindner's exhibits 7 to 28, inclusive.

Exam. Stiles: Exhibits 7 to 28, inclusive, are received in [fol. 73] evidence.

(Defendants' exhibits Nos. 7 thru 28, Witness Bindner, were received in evidence.)

Exam. Stiles: You may cross-examine.

Cross-examination.

By Mr. Kuhn:

Q. Your exhibit No. 14, showing the number of carloads of grain going to various destinations, is that all of the grain that moved out of these points for the year 1945?

A. Yes, sir.

Q. I don't see any movement here to St. Joe, Atchison, or Topeka. Can it be possible that not a single car went from that territory to any of those three markets?

A. Well, you probably misunderstood my explanation of the exhibit.

Q. Perhaps.

A. The only destinations shown under column B are those in their relation to the Northern Kansas division of the Missouri Pacific. In other words, there were—as for instance, on exhibit 14, from Lenora, 228 cars of wheat shipped to Atchison. Now, that means that the Northern Kansas division hauled that traffic to Atchison. It might have gone beyond, but that is the extent——

Q. Oh, it might have gone beyond?

A. That is correct.

Q. The reason I asked that question was, I was wondering [fol. 74] if there wasn't anything to Kansas City, St. Joe, or Topeka. I didn't know why they spent the time and money to come up here. Now, you stated that you haven't received any complaints from the growers in the territory involved with reference to the exhorbitant rates to Omaha?

A. Yes, sir; that is my statement.

Q. Have you received any——

A. Since that particular time in, I think it was 1936.

Q. Have you received any complaints from any elevator operators?

A. In that territory?

Q. Yes, sir.

A. No, sir.

Q. Are those elevators located on the land of the Missouri Pacific Railroad?

A. You mean——

Q. The country elevators.

A. Operated by the Missouri Pacific?

Q. Yes, the country elevators.

A. I don't know who owns the property.

Q. You certainly must know that 100 percent is owned by the Missouri Pacific Railroad and leased to these people at a very nominal rental?

A. Well, as I said, I don't know what the lease arrangement is, or whether these elevators are on private property [fol. 75] or whether they are on property owned by the Missouri-Pacific.

Mr. Kuhn: Well, Mr. Examiner, as the former general freight agent of the North Western lines west of the Missouri River, I will say that——

Exam. Stiles: Well, now, wait. If you want to testify again, wait until rebuttal evidence.

Mr. Kuhn: All right.

A. I am not trying to anticipate what you have in mind, but I am just curious to know what the purpose of the question was. Perhaps we can get on common ground.

Mr. Kuhn: The purpose of the question is this: These men who own these elevators and operate them secure the land from the Missouri Pacific Railroad at a very nominal rental. The Missouri Pacific Railroad also furnishes them with side tracks and maintains them.

Exam. Stiles: Wait a minute. If you want to testify, wait until rebuttal.

By Mr. Kuhn:

Q. Do you know whether or not the railroad maintains the side tracks to the elevators, the country elevators?

A. No, I do not.

Mr. Ware: Oh, I object to that. That isn't cross-examination, anyhow.

Mr. Kuhn: I want to show, Mr. Examiner——

Exam. Stiles: This witness doesn't seem to be familiar with that phase of the situation. He says he isn't.

[fol. 76] Mr. Kuhn: What I am trying to show, Mr. Examiner, is that these country elevators are very loath to complain against the railroads, for fear they will "get the axe," so to speak.

Mr. Ware: I challenge that statement, and require proof of it, I move it be stricken.

Exam. Stiles: However much you may wish to prove it, you can't prove it by this witness, because he says he doesn't know about it; so let's go on.

Mr. Kuhn: I guess you are right. Since he has brought the subject up, Mr. Examiner, I have some letters here. Can I put these in later, or can I go back in rebuttal?

Exam. Stiles: You will have an opportunity to put on rebuttal evidence.

Mr. Kuhn: I will certainly do that.

By Mr. Kuhn:

Q. Your exhibit 25, hay, have you that?

A. Yes, sir.

Q. You show column 1, minimum 20,000 pounds, and column 2, minimum 30,000 pounds, a difference of 5 cents per 100 pounds in favor of the minimum of 30,000 pounds, is that correct? Do you know what the minimum weight is on a carload of wheat?

A. Oh, I don't know what the minimum is. I imagine it will load about——

By Mr. Ware:

Q. Do you know what the minimum is?

A. No, I don't know what the minimum is.

By Mr. Kuhn:

Q. The capacity of the car, isn't it?

[fol. 77] Mr. Ware: He said he didn't know.

Mr. Kuhn: All right. It he doesn't know that, all right.

By Mr. Kuhn:

Q. Your exhibits 26 and 27 show a difference in the rates on cattle and hogs between Kansas City, Atchison, and Omaha. Have you any idea of the amount of business in the shape of livestock that Omaha has ever received from any of that territory?

A. No, I don't have the figures. There was some moving up there.

Q. Very rarely, though.

A. I don't know just what the volume is or was.

Q. A cattle feeder or a cattle shipper wouldn't show good sense to send his stuff to Omaha as against the nearer markets, on livestock that requires expedited service? You know enough about the railroad game to state that, don't you?

A. I do know this, of course: Lower rates might induce a movement to a particular point, but there are other factors enter into it,—markets, in addition to rates, and demand.

Mr. Kuhn: That is all.

Mr. Ware: That is all.

(Witness excused.)

Mr. Ware: We will call Mr. Wicker.

WALTER WICKER was sworn and testified as follows:

Direct examination.

[fol. 78] By Mr. Ware:

Q. Will you state your name and address?

A. Walter Wicker, Falls City, Nebr.

Q. By whom are you employed?

A. Missouri Pacific Railroad.

Q. And in what capacity, Mr. Wicker?

A. Superintendent of the Omaha and Northern Kansas divisions.

Q. And does that include the Missouri Pacific line extending west in Kansas from Atchison to Lenora and Stockton?

A. It does.

Q. And what else does it include?

A. On the Northern Kansas division, it includes the lines you mentioned, and in addition thereto, the line from Yuma to Hastings, the line from Jamestown to Burr Oak, and from Greenleaf to Washington.

Q. And all of those lines are under your jurisdiction?

A. Yes, sir.

Q. And does your jurisdiction extend over the line up to Omaha?

A. From Kansas City to Omaha.

Q. How long have you been with the Missouri Pacific, Mr. Wicker?

A. Since October 15, 1926.

Q. And all of that time have you spent in the operating department?

A. Yes, sir.

Q. Mr. Wicker, are you familiar in a general way with the [fol. 79] issues involved in this cause?

A. Yes, in a general way. I understand it is a rate matter, but I don't know anything about rates. I am an operating man.

Q. And have you made a study in the past week or so in connection with a phase of this case, of the Missouri Pacific line from the west, Lenora extending east to Atchison?

A. Yes, sir; I have given it some thought and study, and I have prepared a statement of tonnage handled from Concordia to Atchison for the months of April, July, and October, for the years 1941 through 1945.

Q. Why, Mr. Wicker, did you select those months, 3 months out of each year?

A. Well, in the first place, the month of July on the Northern Kansas division is the peake month. That is when the wheat crop is harvested, and we build up our service to take care of the demands. I thought it was fair to use that month on account of it being the peak month; and then selected the other two months at random to give a pretty good picture as near as possible of the tonnage and the movement of freight during normal times of the year.

Q. And you think that April and October would be a month before the peak and a month after the peak, and they would represent probably normal months?

A. That is our best judgment; yes, sir.

Q. Now, I note that you have made this study of your [fol. 80] trains operated during that month from Concordia to Atchison. Why did you begin at Concordia?

A. Well, Mr. Ware, as I understand this case, it involves the possibility of the tonnage being diverted from us, or a certain percent of the tonnage, I might say, at Concordia. This tonnage statement that I worked up to the best of my ability would show what effect it would have on our operation east of Concordia. As I see it and as I understand the case, it would not affect any of our service west of Concordia.

Q. That service of the Missouri Pacific west of Concordia into Concordia would be the same regardless of how the traffic is handled Concordia and east, is that correct?

A. That is correct.

Q. Whether it be by Burlington or whether it be by Missouri Pacific, is that correct?

A. That is true. I might say this for the benefit of you and the others concerned, that on the Northern Kansas division Concordia is the breaking point.

Q. And by that do you mean that all traffic which comes in from the west to Concordia is rehandled at Concordia?

A. That is true; yes, sir.

By Exam. Stiles:

Q. That is a division point, isn't it?

A. Well, Mr. Examiner, it is and it isn't. But from a practical operating standpoint, it is a division point. From your point of view, yes, sir.

[fol. 81] Q. In other words, trains are made up there and the crews changed there?

A. You are just as right as you can be on that, sir.

By Mr. Ware:

Q. Now, then, Mr. Wicker, let's deal only for the time being now with a normal period of operation. I want to carry that through from beginning to end, before we deal with your peak month of July. Now, take your sheet 1 of this exhibit. And, Mr. Examiner, may that be identified as exhibit No. 29?

Exam. Stiles: It may be so identified.

(The operating data referred to was marked as "Defendants' Exhibit No. 29, Witness Wicker," for identification.)

By Mr. Ware:

Q. Now, let us take sheet 1 of this exhibit, and you tell us about that, so it will be understandable.

A. Well, starting out, as you suggest, with sheet No. 1, on April 1, 1941, we operated No. 562, which is a red-ball train that operates between Concordia and Atchison. That train had engine No. 101, and it departed at Concordia at 6:55 p. m., with 10 loads, 6 empties, 708 tons. The same train arrived at Atchison at 1:45 a. m., with 21 loads, 6 empties, 1,326 tons.

By Exam. Stiles:

Q. Now, the tons there are gross-weight tons?

A. That is true, Mr. Examiner.

Q. The lading and the car?

[fol. 82] A. That is what we call actual tons.

Now, you might have in mind, Mr. Examiner, that some railroads in some places add an adjustment factor. You have probably heard of that. In this exhibit there is no adjustment factor added. That is what you said it was, the total weight of the lading and the car.

Now, on the same date, of April 1, at that time we were not operating our locals from Atchison to Concordia, but we were operating them between Atchison and Clifton, so on April 1 local 596 operated out of Clifton. He departed—I don't know the time, I didn't show that because Concordia was not involved, but I did show he got to Atchison at 8:55 p. m. with 6 loads, 6 empties, 413 tons.

Q. This No. 562 picked up freight between Concordia and Atchison?

A. That is true, Mr. Examiner. And I would like to explain that to you. You would probably be interested in that. The local at times has so much local work to do, and as you know it is a higher-rated—the men on that train get a higher rate than they do on through service, through freight service, as well as you have one more man on a local than you do in through freight service. So on that line on the Northern Kansas division there are times we have the local assemble what we call "hot stuff," like butter, eggs, chickens, stock, and grain. For instance, at Frankfort or Greenleaf, the local assembles it for the red-ball [fol. 83] train, and he will come along and pick it up. And in addition to that, quite often we have the red-ball train stop at Clyde and pick up flour from the flour mill.

Q. The red-ball train is 562?

A. Sir?

Q. The red-ball is 562?

A. That is the train I am talking about; yes, sir.

Q. And t~~he local 596~~ assembles this?

A. For the red-ball.

Q. For the red-ball to pick up?

A. That is correct; yes, sir.

By Mr. Ware:

Q. Mr. Wicker, whenever you use train No. 562 throughout this exhibit, that is your red-ball train, is it not?

A. Yes, sir. I might give you and the Examiner and the other gentlemen one of our time tables here, and the schedule will speak for itself, if you don't mind.

Q. I think it might be more confusing than helpful.

A. Well, if it is, we will just forget it. There is the schedule, Mr. Examiner, of 562. Here is Concordia. And that is 596, the local.

Q. Now, Mr. Wicker, does the information shown on page 1 of this exhibit 29 show all the trains and all of the tonnage which were operated and handled during the month of April, 1941 out of Concordia and Atchison?

[fol. 84] A. It shows all the eastward freight trains. Now, first-class trains are not involved in this study.

Q. What did you say?

A. First-class trains, passenger trains, are not involved in this study.

Q. Yes. Now, what about your schedules out of Concordia into Atchison, and say out of Atchison into Omaha?

A. Well, 562, that is your red-ball train, is due out of Concordia at 5:30 p. m., and due into Northern Kansas Junction at 12:40 a. m.

Q. Where is Northern Kansas Junction?

A. That is about a half-mile west of the entrance to the upper yard at Atchison. Or in other words, it is where the Northern Kansas division and the Omaha division come together.

Q. What time does it arrive there at that Northern Kansas Junction?

A. 12:40.

Q. 12:40 what?

A. 12:40 a. m.

Q. 12:40 a. m.?

A. Yes, sir.

Q. Now, any traffic in that train going to Omaha, could it make—What would be the first connection out of Atchison to Omaha that it could make?

A. Are you talking about red-ball schedules or extra [fol. 85] schedules out of Atchison to Omaha.

Q. I am talking about your normal operation, now, whatever that is.

A. You understand, Mr. Ware, that on the Omaha division we operate a good many extra trains. Business, of course, regulates that.

Q. Yes.

A. And, oh, at the present time we are operating about from two to four westbound extras a day, and that is around the 24 hours, around the clock. And it is often that we operate an extra westbound out of Atchison between 2 and 4 a. m.

Q. Wait just a minute. You are talking about westbound. Where are you going to then?

A. As I understood your question, it was what connection did he make at Atchison for Omaha.

Q. That is right.

A. When I said "Omaha," I am talking about a train moving west out of Atchison to Omaha that will handle this grain you referred to.

Q. That is all right; that is what I want.

A. We could pick that grain up at Atchison with this extra, and say allow 2 hours for the movement from Atchison to Falls City, which is a very conservative figure, 54 miles from Atchison to Falls City; and an hour to 2 hours in Falls City yard, in which we operate those extras, and [fol. 86] 6 hours from Falls City to Omaha. It would be from 10 to 12 hours from arrival at Atchison to arrival at Omaha on an extra.

Now, in case it should so happen that on one day we had grain coming into Atchison, and we did not have an extra, we did not have anything but our red-ball trains, No. 165 red-ball train operating between Kansas City and Omaha is due out of Kansas City at 4 a. m. He is due out of Atchison at 6:55 a. m., and into Omaha at 5:45 p. m. That would give us ample time under any operating condition except a very severe derailment to put that business in 165 at Atchison for Omaha.

Q. Now, the total elapsed time, Mr. Wicker, say from Concordia to Omaha, assuming that you catch your first connection out of Atchison, how much time would elapse between the time it left Concordia and arrived in Omaha?

A. Well, 5:32 p. m. is the 562 schedule out of Concordia, and on that first schedule he should be into Omaha about 4 or 5 p. m.

Q. The next day?

A. The next day.

Q. That would be about 23 hours?

A. That would be about 23 hours.

Q. Now, then, assuming that he missed that first train out of Atchison to Omaha, and he caught your next train, which you say is almost—There would not be much of a chance of missing that. How much time would elapse then [fol. 87] between Concordia and Omaha?

A. 24 hours and 10 minutes.

Q. 24 hours and 10 minutes?

A. Yes, sir. You understand, Mr. Ware, talking about that first schedule, there is a drag. That is a train that is not a red-ball train. He is a tonnage train and is a drag, and we are not putting forth an unusual effort to get him over the road. In other words, he is going in the hole for the other trains. These are figures we actually make every day.

Q. Yes. What about your handling of this traffic at Omaha? What about your switching operations there?

A. At Omaha?

Q. No, at Concordia.

A. Now, you have two periods, and I presume you want me to talk about both of them, about the normal operation and the peak period. At the present time at Concordia we are working one switch engine. That engine goes to work at 7:45 a. m. Of course, his 8 hours is up at 3:45 p. m., and after that it is time and a half. And we attempt to get that engine tied up just as soon as possible. Just as soon as the connections arrive at Concordia from the west and they are switched up, 562 is dispatched, and any city business we may have is spotted, any cars going to any of the connections, three other railroads at Concordia, are delivered, then we tie up our switch engine. Now, during the peak period, July, when we have the wheat harvest on, [fol. 88] we work two switch engines, 7:45 a. m. to 3:45 p. m. for the first engine, and the second engine goes to work at 3:45 p. m. and he ties up along in the morning when he gets through. Sometimes the 16-hour law is crowding him pretty hard. But he will clean up—I have never seen the time that he didn't clean up before he tied up within the 16-hour law.

Now, I might say this. In the 2 years I have been in the territory, we have been awfully short of men. In fact, we have taken men off of the section, B. and B. gangs, and used them as brakemen and firemen and switchmen, and we worked that second switch engine at times really longer than we should, but we did clean up and we accomplished everything we set out to do.

Q. Now, each evening, then, you would switch sometime or other, either during the normal time or with this second switch engine during the peak times, you would switch your connecting traffic to Concordia in the evening, would you not?

A. Well, it would be in the evening or early morning.

Q. Yes. Now, do you know, Mr. Wicker, what time the Burlington freight leaves Concordia going to Omaha?

A. It is my understanding they leave at 8 a. m. They did when I was out there, and I don't think there has been any change.

Mr. Kuhn: You are correct.

By Mr. Ware:

Q. Is that the only train which they operate from Concordia to Omaha?

[fol. 89] A. That is my understanding; yes, sir.

Q. Then any traffic which you would switch from points on the Missouri Pacific west of Concordia to the Burlington at Concordia would be switched in the evening, and it couldn't get out of there until the next morning at 8 o'clock, is that correct?

A. That is my understanding; yes, sir.

Q. Now, take up your page 2. Well, just a minute. Before you leave page 1 of your exhibit, let me ask you, down there it seems as though you have on the 18th of April, you show that you double-headed that red-ball train, and it seems as though you had a light load of 635 tons all the way through to Atchison. Can you state on the record why you double-headed that train?

A. Yes. That happens every month. Here is our situation: As you know, we have to have those engines inspected for an ICC inspection once a month. Now, the 2300-class engines—that was engine 2360 that double-headed 562 on that date.

Q. 2360?

A. 2360. On account of the light rail west of Downs, we operate those 2300's on the west end. Now, there is not enough of that power to justify an inspector and the necessary equipment on the Northern Kansas division, so we bring those engines into Atchison for the ICC inspection, and it is cheaper to double-head them than to run them light.

[fol. 90] Q. Now, take up your sheet 2, which covers the month of July. That is one of your peak months, as I take it?

A. That is true. In fact, I might say this, for the benefit of the record, that July, 1945 was the heaviest month, in the way of gross ton miles, in business on record on the Northern Kansas division.

Q. By the way, Mr. Wicker, before you take up that page, let me ask you if you know what time the Burlington train leaving Concordia for Omaha at 8 o'clock in the morning would arrive in Omaha?

A. Only by hearsay.

Q. Well, what is the basis of your information? Tell me that first.

A. Oh, conversation with the train and engine crews around over as I meet them and talk to them in my work.

Q. You mean the Burlington crews?

A. Yes, sir.

Q. Would you care to state, then, about what time, according to your information, that train would arrive in Omaha?

A. I wouldn't mind stating, but I couldn't vouch for the accuracy of it.

Q. Well, state what it is.

A. According to the crews and conversation with them, it takes about 36 hours to handle the business through to Omaha from Concordia.

[fol. 91] Q. You don't know how that is handled, do you, over what line of the Burlington?

A. It is my understanding that they move it by local all the way from Concordia to Crete, and that is handled by red-ball from Crete into Omaha.

Q. All right. Now take up your page 2 of exhibit 29.

A. Page 2 demonstrates the flexibility of our operation, and that we have the railroad, the plant, and the facilities to handle all the tonnage that is offered to us, regardless of how big it comes.

Q. Go ahead.

A. I think that speaks for itself. I will be glad to attempt to answer any question that is asked, but it shows everything there, that we go up to a pretty big business, and we have the railroad to handle the business on.

Q. Now, then, you show a good many instances there during July that you use two engines on those trains. Now, why do you do that? Is that because of the load?

A. That is it; that is according to the load. On your double-heading rule, with your train and enginemen you can handle as many as 40 cars, under your so-called double-heading rule. We can handle as many as 40 cars under your double-heading rule. We can handle the 40 cars and double-head, and handle more than one engine could handle, and that saves operating that many more trains between Concordia and Atchison during your heavy movement. I [fol. 92] might again add and refer to the July of 1945 statement, and mention that in addition to the wheat movement we handled 405 cars into the naval base at Hastings, and 237 cars out of the naval base at Hastings, and that movement, as all of you know, is practically over now. There is a little ammunition going into the naval base, but very, very little coming out at this time. Of course, that traffic is gone, and we will miss that from now on.

Q. Now, Mr. Wicker, during this peak season I noticed that some days you don't operate your red-ball train No. 562 at all. What happens to it?

A. Well, in your operation you have the privilege of annulling any or all schedules. Now, it was better from an operating standpoint for the dispatcher to annul 562 and run all of these schedules as extras.

Q. And then you run extras, whatever is necessary, to take care of your business, is that correct?

A. Yes.

Q. And you have always taken care of that peak movement out there on that branch without any trouble?

A. Yes, sir. I am proud of that movement.

Q. Now, the month of October again is what you call more or less of a normal period?

A. You go back to your normal operation there.

Q. Now, does about that same explanation carry all [fol. 93] through the years from 1941 to 1945, as covered by your exhibit here?

A. I think so.

Q. What is sheet 16 of your exhibit 29?

A. That shows your tonnage rating, what you can handle, between Atchison and Concordia, or Concordia and Atchison, and you will notice there is a break in tonnage at Greenleaf. In other words, on account of your grade, you can handle more tonnage between Concordia and Greenleaf than you can between Greenleaf and Atchison. Take one example here, with your "1" class engine, superheaters.

Exam. Stiles: What page are you on now?

A. Sheet 16, Mr. Examiner.

Mr. Ware: It is the last page.

A. Between Concordia and Greenleaf, you can handle 2,000 tons, and between Greenleaf and Atchison you can handle 1,750 tons.

Mr. Ware: That is all.

By Mr. Scott:

Q. Mr. Wicker, turning to page 16 of your exhibit 29 again, which engines do you use or which type of engine do you use in your operation east of Concordia?

A. Mr. Scott, we attempt to use the superheater "1" class engine, or in other words, that 1 to 173, Super K. Now, during the heavy period we do not have a sufficient number of those engines, and we fall back on the "400" class engine, and even press the "2300" class engines in service; but that engine 1 to 173 is the best type of engine for that division. [fol. 94] Q. That is what you would like to use if you had the business for it?

A. If I had the engines to go around for the peak business; yes, sir.

Q. Now, I notice that rating for that class engine—That is in the first line of the table?

A. Yes, sir.

Q. That is 2,000 tons from Concordia to Greenleaf, and in the second block of the statement, 1,750 tons from Greenleaf to Atchison.

A. You evidently didn't catch my explanation, Mr. Scott.

Q. Yes, I caught your explanation. Go ahead and answer my question.

A. I beg your pardon, sir.

Q. Go back to page 1. I notice that in the right-hand column, that your train tonnage into Atchison was in every instance less than 1,750 tons. Does that mean you could have handled more tonnage with the same trains?

A. That is what I said a while ago,—we cleaned up every night. We didn't have the business to go.

Q. I would like to have this clear. Those trains on page 1, do they include every train you operated in the month of April 1941?

A. No. I explained that to Mr. Ware a minute ago.

Q. I wanted that to be clear.

[fol. 95] A. That did not include first-class trains.

Q. Well, let's say all the freight trains?

A. That is right.

Q. And that would be true of every month's statement in this exhibit?

A. That is right; yes, sir.

Q. Every train in that indicated month has been included?

A. Eastbound.

Q. Eastbound from Concordia?

A. Yes, sir.

Q. Now, I want to ask you another question. In picking up the train on the west end, west of Concordia, your train No. 594 brings it into Concordia, does it not?

A. Yes, sir.

Q. And when is that scheduled to arrive at Concordia?

A. That is 592, Mr. Scott, between Downs and Concordia, is that what you are talking about?

Q. That is right.

A. He is scheduled into Concordia at 3:10 p. m.

Q. Now, can you work the grain in that train in time to get out on your red-ball 562 that same afternoon?

A. Oh, we do that every day.

Q. That is current practice?

A. Yes, that is established practice.

Q. Now, if that same grain coming in on 592 is transferred [fol. 96] to the Burlington, when would the Burlington get it out of Concordia?

A. To which I said a while ago I understand *I understand* their train does not leave until 8 a. m. the next morning.

Q. You could have the grain practically to Atchison by the time their train could take care of it?

A. Yes.

Q. All right.

A. I might give you this explanation, that there hasn't been anything said about. You notice we only operate one through train between Concordia and Atchison, and that train handles all the grain, as well as the livestock. Now we have a very nice livestock business off of the Northern Kansas division, and we make the Kansas City market with that stock every morning, so we have this 562, the train you are talking about, into Atchison with regularity between 11 p. m. and 1 a. m., and then we run a connection out of Falls City to connect with 562 at Atchison, and handle that stock into Kansas City. That is a very important train, and we do get our red-ball trains into Atchison on time. In fact, the Northern Kansas division is in first place on red-ball operation of trains on time.

Q. Now, my statement is correct, isn't it, that under the schedule that you have outlined here, you can have this grain into Atchison before the Burlington could hook onto it at Concordia, is that correct?

[fol. 97] A. Yes, sir; much before that.

Q. And then from Atchison to Omaha you say you make that in from 10 to 12 hours?

A. That is the easy schedule.

Q. And you are able to maintain these schedules with some fidelity, are you?

A. Yes, sir. Well, I might say it is this way,—that for the 10 days of this month, the red-ball trains operated on the Omaha division were 94 percent, and on the Northern Kansas division 99 percent on time.

Q. Now, let me ask you this question, please: You refer to this 562 train as a red-ball train. Do you consider the operation on your line east of Concordia as a main-line operation, as distinguished from branch-line operation?

A. I do not consider that branch line. That is a main line.

Q. That is a main line?

A. Yes, sir.

Q. This Burlington line from Concordia to Wymore, would that be the same type of line, or different?

A. It is my understanding that is a branch-line operation, and they do not operate any red-ball trains over that line.

Mr. Scott: That is all, thank you.

By Exam. Stiles:

Q. Let me see if I have this right. As I recall, you said you would get a car out of Concordia and into Omaha in 24 hours and 10 minutes, was that it?

[fol. 98] A. Yes, sir.

Q. And it would leave Concordia at 5:30 p. m.?

A. Yes, sir.

Q. Whereas the car that is going via the Burlington, which you understood took 35 hours, 35 or 36 hours, whatever it was, wouldn't get out of Concordia until 8 the next morning?

A. That is my understanding, Mr. Examiner.

Q. Which would be the difference in time between 5:30 p. m. and 8 the next morning, that would be added to the running time to indicate the additional time required to get the car to Omaha?

A. Yes, sir.

Exam. Stiles: Anything more?

Mr. Ware: That is all.

Exam. Stiles: Cross-examination.

Mr. Kuhn: I haven't any.

Mr. Ware: We wish to offer Mr. Wicker's exhibit No. 29 in evidence.

Exam. Stiles: Exhibit No. 29 is received.

(Defendants' exhibit No. 29, Witness Wicker, was received in evidence.)

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Ware: May Mr. Wicker be excused permanently? He wants to get away this evening. Do you want to hold him here?

[fol. 99] Mr. Kuhn: No. I will want to refute something he said, but he can go home.

Mr. Ware: That is all for the defendants.

Exam. Stiles: Is your other witness here yet?

Mr. Kuhn: Yes. Are you ready for him now?

Exam. Stiles: Yes.

Edward L. Vauck was sworn and testified as follows:

Direct examination.

By Mr. Kuhn:

Q. State your name and business connection to the reporter, please.

A. Edward L. Vauck, traffic manager, Farm Crops Processing Corporation, Omaha, Nebr. I spent about 7½ years working for the Nebraska State Railway Commission at Lincoln, Nebr., most of that time as assistant rate expert in the rail rate department.

Q. Just what is the Farm Crops Processing Corporation, Mr. Vauck?

A. They are the operators of the Omaha Alcohol and Syrup Plant.

Q. How long has it been in operation?

A. It has been in full operation better than a year.

Q. What are the ingredients entering into the manufacture of your products?

A. Any kind of grain that possesses large quantities of starch, such as wheat, corn, sorghum grains.

[fol. 100] Q. What is your immediate competition in purchasing grain?

A. Our immediate competition in the trade is the alcohol plant at Kansas City.

Q. At Kansas City?

A. At Kansas City, Mo.

Q. What has been your consumption of grain since your operation, that is, average consumption per day?

A. It would run about 20 carloads per day.

Q. Do you expect any increase in that?

A. Well, that would depend upon governmental quotas and restrictions relative to increase over our consumption of grain for alcohol.

Q. Have you used any grain produced along the line of the Missouri Pacific from the territory involved in this case?

A. I checked our records of grain origins, and I haven't found a single car that came off of that division.

Q. Do you bid in the country for the grain?

A. We bid out in the country, but not on that line. It wouldn't do us any good.

Q. Why?

A. We can't meet the—We can't get any grain from that branch because of the freight rate that we would have to pay.

Q. Is there anything you care to add?

A. Well, we did have some grain from the Missouri Pacific where it moved over the Hastings connection, and it seems to me that——

[fol. 101] By Exam. Stiles:-

Q. That is points in Nebraska?

A. That is right. That moved on a joint basis. And it seems to me that we could get some grain along the Northern Kansas line of the Missouri Pacific if the freight rate to Omaha was comparable with that enjoyed by our competition. We do take grain from the Rock Island line, where the rates are similar between Omaha and Kansas City; and based on my observation, I think that relief should be granted in this instant complaint.

By Mr. Kuhn:

Q. You said you secured some grain from points on the Rock Island from Kansas?

A. The Northern Kansas line of the Rock Island.

Q. Do you get any grain from Kansas by the Kansas branches of the Burlington where the rates to Omaha and Kansas City are one and the same?

A. Yes, I think we did, two or three cars from Concordia.

Q. On which the rate is the same to Omaha as to Kansas City?

A. Yes, sir.

Mr. Kuhn: That is all.
Exam. Stiles: Any cross-examination?

Cross-examination.

By Mr. Ware:

Q. Where have you been getting your grain, Mr. Vauck, to supply your alcohol plant here in Omaha?

A. Oh, that has come from various points in the country. A lot of it has come from Nebraska, some from Kansas, and during the war we reached out and got grain wherever we could get it.

[fol. 102] Q. Did you get some in South Dakota?

A. Yes, sir.

Q. Have you had any difficulty in getting all the grain necessary to meet your requirements?

A. At the present time we do experience some difficulty, but I suppose that is due to a scarcity of grain in the country.

Q. That is what you attribute it to, a scarcity of grain in the country?

A. Well, everyone else attributes it to that, so I suppose we should.

Q. This grain that you draw from points in Kansas, that comes from that area in Kansas north of the Missouri Pacific line which is involved in this case, doesn't it, on and north of it? Concordia is on that line, but I say with the exception of Concordia, it is mostly north of that line, is it not?

A. No, I wouldn't say that.

Q. All right; what would you say?

A. We have drawn grain from the Rock Island line which is north, but we have also drawn some grain from the territory south of that line of the Missouri Pacific here in question.

Q. Where did you get it from?

A. From points on the Santa Fe.

Q. And what rate did you pay on that?

A. We paid a lower rate from the Santa Fe points than we would pay if we drew grain from the Northern Kansas [fol. 103] division of the Missouri Pacific.

Q. How did that grain move?

A. Santa Fe and S. B. & Q., I believe.

Q. Where is their connection?

A. I don't know how they handle it as an operating proposition. I know that we did not pay the Kansas City or Atchison combination.

Q. You paid the same rate that would apply from that country origin to Kansas City?

A. I wouldn't be prepared to say that we did on that. I know that we did not pay the Kansas City combination or the Atchison combination which would be required on grain coming off of the branch of the Missouri Pacific line here in question.

Q. All right.

A. In other words, we obtained grain from the Santa Fe at a lower cost per hundredweight for freight than would be required from your line, but the grain came from south of the Missouri Pacific line.

Q. How much grain did you get from the Santa Fe origin?

A. I have no records that would give that in pounds or in bushels, but we did obtain considerable grain.

Q. How many carloads was it?

A. Well, when you are handling 20 carloads a day, you hardly stop and count carloads from a specific origin. I do know we had to get grain down in that area, and did get it.

[fol. 104] Q. But you don't know how many carloads?

A. No.

Q. You don't know whether it was 10 or 20?

A. Well, I do know I paid freight bills on something like 35 or 40 carloads last summer that moved on that basis.

Mr. Ware: That is all.

By Mr. Scott:

Q. I would like to ask you, as I make a calculation on this 20 cars a day you have mentioned to us, that is about 10 million bushels a year, isn't it?

A. On that basis; yes, sir.

Q. Is that the size of your operation now?

A. You are assuming something there that I don't believe would be true, because an alcohol plant does not operate every day of the year. Normal operations would run approximately 300 days a year, and at the present time we operate only about 6 days a week average, which would come under the 300 days a year.

Q. Well, how far off are we from 10 million bushels?

A. Well, we would operate, taking into consideration operations since October 1, 1945, about 275 days a year, and average consumption since that time would have run or has run about 20,000 bushels of grain every day, and as you know—or you may not know, but our alcohol plant production, of course, has been restricted, and our syrup plant operations are just commencing.

[fol. 105] Q. Well, then, you can't give me any figure that is better than 10 million, can you? You wouldn't know whether it was 5 or 6 or some other million?

A. During the time we operated under government operation, that is, making alcohol for the government, we operated about 7 months on the basis of 20 cars a day, and we operated 6 days a week, or an average of 25 days a month during that time.

Q. Well, we can say, can't we, you wouldn't use any more than 10 million bushels a year?

A. No, we wouldn't use any more than that.

Q. Do you want the Commission to understand you are having difficulty in acquiring grain for your plant?

A. I am not saying we are having difficulty in acquiring grain for our plant under ordinary circumstances. We would like to obtain grain from points that are not as far away as we have had to go in the past to get grain. It isn't satisfactory to go to Texas, the State of Washington, and to Canada for grain when we have nearby supplies of grain that with equitable freight rates could supply us with some of our needs.

Q. You know, don't you, that Omaha as a market last year had a surplus of grain shipped out of Omaha of more than 90 million bushels?

A. No, I don't know that.

Q. You know they had some surplus, don't you?

A. There would be a surplus.

[fol. 106] Q. You don't think all the grain was eaten here, do you?

A. No; I don't think all the grain is eaten at Kansas City, either, that arrives there.

Q. I will agree with you on that.

A. There would be no sense in having a market if it was all consumed locally.

Q. Let me ask you this question, now: What do you do with the refuse after your distillation process?

A. That is sold to feed mixers for producing livestock feeds.

Q. And that is shipped out of the market?

A. That would be shipped out of the market.

Q. And when you get into syrup production, you will have other refuse that will go into the same channels, will you not?

A. The refuse will be the same as we have produced as an alcohol plant.

Q. What part of the grain will be reshipped in that form?

A. Well, that would be difficult to say, because our local consumption of that is increasing. As an alcohol plant, you can recover 30 percent.

Mr. Scott: Thank you, that is all.

Mr. Kuhn: That seems to be all.

Exam. Stiles: You are excused.

(Witness excused.)

Exam. Stiles: We will take a brief recess, after which the interveners may proceed.

[fol. 107] (A short recess was thereupon taken.)

Exam. Stiles: We will resume.

Mr. Ware: Mr. Examiner, I would like to recall Mr. Bindner for the purpose of giving the tariff authority and the distance authorities used in his exhibits.

C. J. Bindner recalled, testified further as follows:

Direct examination.

The Witness: Exhibit No. 10, authority for mileages, Agent Marsh's ICC 3339.

Exhibit 18, same tariff for Missouri Pacific mileages; for Burlington mileages, ICC 19967.

Exhibit 19, same as 18.

Exhibit 21, Missouri Pacific mileages, Marsh's ICC 3339. For the rates, C. R. I. & P. ICC C-12973. For the Rock Island mileages, ICC 11924.

Exhibit 22, same as 21.

Exhibit 23, mileages, ICC 3339 of Agent Marsh's. Rates, Missouri Pacific ICC A-9719.

That covers all the authorities. The other exhibits are adequately covered.

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Scott: Are you ready for us?

Exam. Stiles: Yes, sir.

[fol. 108] Mr. Scott: Call Mr. Allison, please.

William F. Allison was sworn and testified as follows:

Direct examination.

By Mr. Scott:

Q. Will you state your name and residence, please?

A. William F. Allison, Atchison, Kan.

Q. What is your occupation, Mr. Allison?

A. I am assistant manager and buyer for the Blair Elevator Corporation.

Q. What are your principal duties in that connection?

A. I do all the buying for all the feed ingredients and grain for the corporation in the conduct of our business.

Q. How many years' experience have you had in the grain business?

A. I have been with this firm for 10 years, with the exception of the last 2 years, a little over 2 years, which I spent in the navy.

Q. Now, in what business is the Blair Elevator Corporation engaged?

A. We are receivers and shippers of grain, and manufacturers of commercial feed.

Q. Do you do a general merchandising business in grain?

A. Yes, sir.

Q. Do you operate an elevator in connection with your [fol. 109] operations?

A. Yes, sir; we have an elevator capacity of 350,000.

Q. And that is located at Atchison?

A. Yes, sir.

Q. Is there an organized grain exchange at Atchison?

A. Yes, sir; there is. It is known as the Atchison Board of Trade, and it represents two flour mills, a feed mill, the Midwest Solvents Company, which is an alcohol company, and two seed houses. It is chartered——

Q. Beside your own business?

A. Besides our own; yes, sir. It is chartered under the laws of Kansas, and is a non-profit organization.

Q. What is the general purpose of the organization?

A. The general purpose of the organization is to help develop Atchison as a terminal market, to promote agricultural interests in and around Atchison County and nearby vicinities from which we draw grain, or can draw grain.

Q. In connection with the operation of Atchison as a market, do you have facilities for the inspection and weighing of grain under official supervision?

A. Yes, sir; we do. We have the Kansas State Inspection Department there, which has a licensed Kansas inspector and is state-supervised.

Q. And have you means of determining the protein content of wheat?

[fol. 110] A. Yes, sir. We have an official chemist of the Atchison Board of Trade for the determination of the protein in the wheat.

Q. Now, is that facility for inspecting and weighing grain and determining protein an important adjunct of the Exchange's operation?

A. Yes, it is. It is very important, we feel. We get quite a bit of country grain in that is consigned to Atchison. These shippers, country shippers, consign this grain. It is stopped at Atchison for the first inspection. This is true especially when it comes in off of this Central Branch line of the Missouri Pacific. Then it is very helpful also to the mills and other firms there for determining the proper grade of the grain coming into Atchison.

Q. Could you maintain a service of this kind if the supplies of grain coming into Atchison were seriously curtailed?

A. No, sir; I do not believe we could. I think Mr. Emery, who is the chief inspector of the State of Kansas, has indicated that any dropping off, shall I say, of receipts of grain —and of course dropping off in receipts of grain means dropping off of the inspection—will seriously curtail the operation there, and there would be a possibility that the office would be removed. If this came about, if this office were removed, of course we would have to go to St. Joe or Kansas City to get our official inspections.

[fol. 111] Q. Are you familiar in a general way with what is involved in this proceeding?

A. Yes, I am; in a general way.

Q. What is the attitude of your company toward the matter?

A. Well, we are quite naturally opposed to this granting, shall I say, of this routing through Concordia; because, first, the Central Branch is the only territory from which we can draw grain direct. What I mean is that Atchison is the first market through which this grain can come. By so having this, it gives us a chance to help out the country shipper, and gives us a chance to get a little better quality grain, shall I say, for our clientele or our trade. If it comes through other markets, there is a very good chance that you get what is left over. You do not get the first-pick grain, shall I say. You do not get the first pick of the grain that comes into the market.

Q. By reason of your location, are you able to have first access to the supplies of grain on the Central Branch?

A. That is right. Atchison is the first stop, the first, shall I say, terminal market stop, or first inspection point of any grain coming off the Central Branch line.

Q. There is no market on the branch west of Atchison?

A. That is so; there is no market on the branch west of Atchison, no, sir.

Q. And do you fear that there will be a diversion of grain off the branch at Concordia if the complainant should prevail here?

[fol. 112] A. We fear that; yes, sir.

Q. Now, are you in a position to state the attitude of the Atchison Board of Trade in this matter?

A. Yes, I think I can. I was authorized by the board of directors of this organization to come up here and testify in this case, and every one of them was very greatly concerned over this case, for fear of losing some grain.

Q. Now, the exhibits of records show that the grain principally produced is wheat. Is that your understanding, as a practical man?

A. That is principally wheat; yes, sir.

Q. And do you have mills at Atchison to grind this wheat with other wheat?

A. Yes, sir; there are two mills there.

Q. You might give their names.

A. There is the Blair Milling Company and the Pillsbury Flour Mills.

Q. Do you know what the daily grinding capacity or output is?

A. No, sir; I really do not.

Q. Are they sizable operations, or insignificant?

A. No, they are sizable operations.

Q. What is the next most important grain produced along the branch?

A. I believe the next most important grain produced along the branch would be corn and sorghum grains.

[fol. 113] Q. Are those grains produced in such volume that you could rely upon the branch for your supply of those grains?

A. Not our complete supply; no, sir.

Q. What is your practice as a rule with reference to gathering in those grains? Where do you get them?

A. On corn we go primarily into Iowa and Nebraska, when we can. We would like to get more from Nebraska, if it was possible, but if other things are not equal, we go into Iowa. Sometimes we go into South Dakota and southern Minnesota for this grain, for corn.

Q. What can you say of oats?

A. The supply of oats on the Central Branch I would say is negligible, and we do go into Iowa, Minnesota, and South Dakota for oats.

Q. What part of Iowa do you resort to for oats and corn?

A. We mostly have to go into northern Iowa.

Q. Do you know what the rate situation is from that section to Atchison, as compared to Omaha?

A. I believe it is based on a flat rate into Omaha, and the proportional from Omaha to Atchison.

Q. Do you know what that porportional is?

A. 6½ cents.

Q. You have to pay 6½ cents more to originate these grains you speak of in Iowa?

A. Yes, sir.

[fol. 114] Q. And is that true of South Dakota and Minnesota?

A. If believe it is true of South Dakota and Minnesota; yes, sir.

Q. How important is the production of sorghum grains on this branch?

A. I would say that is negligible also, comparing the amount we use and merchandise as to what is grown, shall I say. Our principal source of sorghum grains comes from out in Kansas.

Q. Now, Mr. Allison, have you ever known wheat to move from northern Kansas to Minneapolis and other Minnesota mill points?

A. Yes, sir. I believe that just about the time I started with the organization there was quite a bit of movement of wheat into the northern states.

Q. What conditions bring about the demand from that section of the country?

A. If they should have a drought, or a spring kill for some reason or other of their wheat, or a short crop for any reason, we would naturally have a demand from that territory.

Q. When that occurs, would you as a grain merchant endeavor to sell wheat to Minnesota millers?

A. We would endeavor to sell it, yes, but I don't imagine we would be very successful because of the 6½-cent difference between Omaha and our market there at Atchison, which I would say would be approximately 4 cents a bushel, somewhere in there. And that would be quite a sum for any grain man to——

[fol. 115] Q. You mean the difference in the outbound rates, do you not?

A. That is right, sir.

Q. You have heard it testified here, haven't you, that the inbound rates from points on the Central Branch are 6½ cents less to Atchison than to Omaha?

A. That is right, sir.

Q. Now, in that condition of the rates, are you equalized with Omaha merchants in taking grain off the branch and selling to Minneapolis and other Minnesota milling points?

A. No, sir; we are not.

Q. You would be from a rate standpoint?

A. We would be from a rate standpoint; yes, sir.

Q. Now, suppose the same rates were granted from the branch points to Omaha as you have to Atchison?

A. Then we would be to a disadvantage of 6½ cents under them.

Q. You already think you are at a disadvantage, you say?

A. Well, if the rate was equalized, we would have the proportional rate of 6½ cents more than the Omaha rate from the same origin territory.

Q. Do you know what your rate is from Atchison to Minneapolis?

A. I believe it is 18½ cents. I wouldn't say for sure.

Q. That is right. That is a proportional rate, isn't it?

A. Yes.

Q. And what is it from Omaha to Minneapolis?

[fol. 116] A. I believe it is 12.

Q. That is a difference of 6½, that is what you have referred to?

A. That is right.

Q. Now, could you as a grain merchant absorb this difference of 6½ cents a hundred pounds and meet your competition?

A. No, sir; we couldn't.

Q. Why is that?

A. You just couldn't absorb the freight. That amounts to approximately 4 cents a bushel, I believe.

Q. Your margin is not that great?

A. Our margin is not that great; no, sir.

Q. Now, have you anything else to say to the Commission by way of information informing the Commission of the attitude of the Atchison people concerning this matter?

A. Well, we would also like very much to buy grain from north and west of Omaha,—that is, we would have a good demand for it, and as far as that goes, a good demand for any type of grain we can get at this time; and by the same token, we are out of line in that territory.

Q. Now, what territory do you have in mind? Will you be more specific about that?

A. Well, north of Omaha and west on the—say on the main line of the "Q" going west out of Omaha.

Q. On the main line of the Union Pacific, do you know [fol. 117] what the situation is there?

A. On the Union Pacific that would be approximately the same thing.

Q. You are required to pay 6½ cents more than Omaha to obtain grain from points on the main line of the Union Pacific in Nebraska?

A. That is right.

Q. Now, conversely, Omaha at present is required to pay 6½ cents more than you from the Central Branch?

A. That is right.

Q. Omaha is a terminal of the main line of the Union Pacific?

A. That is right.

Q. And you at Atchison are the terminus of the Central Branch?

A. That is the way we like to consider it.

Q. And do you know whether you are a proportional-rate market?

A. I don't believe I understand your question.

Q. Do you know whether proportional rates apply out of Atchison generally?

A. I believe they do; yes, sir.

Mr. Scott: You may cross-examine.

Cross-examination.

By Mr. Kuhn:

Q. Do you do any business to Memphis and that part of the country?

A. Very little.

Q. Any business to the south?

[fol. 118] A. Yes.

Q. Your rate from Atchison to Memphis and the south is 6½ cents less than the rate from Omaha, is it not?

A. I do not know, Mr. Kuhn.

Q. Your rate is the same as the Kansas City rate, though, isn't it?

A. I believe it is.

Q. Do you make your prices based on Kansas City prices, or how do you arrive at your prices?

A. We use Kansas City and Omaha both in arriving at our prices, sir.

Q. Now, you refer to losing the office of the inspection department. You are sufficiently familiar with the line of the Missouri Pacific to know that any shipments, say from Lenora—we have used that so much here—going to Kansas City are routed via Atchison?

A. That is right.

Q. Are those cars stopped at Atchison for inspection that go to Kansas City?

A. A large part of them are, I would imagine.

Q. You would imagine, but you do not know that for a certainty?

A. No, sir; I do not know that for a certainty. I do not have actual figures on it. I said there was a fear of losing that, did I not? I didn't say definitely we were going to lose it.

[fol. 119] Q. Well, either one will answer the purpose. I wanted to develop whether or not the business going to Kansas City was stopped at Atchison for inspection to support the inspection department at Atchison. As a matter of fact, every car that gets into Kansas City is inspected at Kansas City?

A. I think that is right, too. And I do know of certain cases when grain coming out there has been stopped at Atchison for inspection when destined to Kansas City.

Q. Now, when you get wheat from points in southern Kansas, Oklahoma, etc., you pay the same rate into Atchison as paid to Kansas City?

A. We to my knowledge have never bought any wheat out of Oklahoma.

Q. How about southern Kansas?

A. We have never bought any wheat out of southern Kansas.

Q. In what part of Kansas do you buy your wheat?

A. We try to buy all of our wheat from what is known as the northeast Kansas territory, the main line of the Missouri Pacific, Central Division, I believe it is called.

Q. Do you depend upon that Central Branch entirely in the northern part of Kansas for your supplies?

A. For our personal supply, yes.

Q. And still your organization carries the thought that you want to uplift, if you please, the producers in Kansas, including this particular branch?

[fol. 120] A. In the vicinity of Atchison, yes.

Q. In the vicinity of Atchison. Would you call Lenora and Concordia in the vicinity of Atchison?

A. We would, yes.

Q. Did you ever hear of the price of grain at Omaha being higher than the price at Kansas City?

A. No, sir, I have not in the last—You understand I haven't been there for 2 years.

Q. But notwithstanding the fact that you were out, or your organization is out to assist the people producing grain in that territory, you do not want them to have the benefit of the Omaha competition, because you insist that the rate to Omaha be 6½ cents higher than the rate to Kansas City and Atchison?

A. We would do that if we could compete with north of Omaha and west of Omaha.

Q. Can't you compete with north of Omaha on any business you secure from territory where the rate to Atchison is 6½ cents less than the rate to Omaha?

A. I am talking about this territory north of Omaha and west of Omaha, on the main line of the "Q" and the Union Pacific, in which the rate to Atchison is a combination of the flat rate into Omaha and the proportional rate into Atchison.

Q. Now, are you talking about destination territory or origin territory?

A. Origin territory.

[fol. 121] Q. Oh, you are talking about origin territory. I was talking about destination territory. You don't know that Omaha sells—or do you?—business outbound to Minneapolis and that territory, do you?

A. I would imagine they would.

Q. Why? I will go a little further. I assume that you don't take the position of being an expert in rate matters?

A. That is right.

Q. But you know there is a proportional rate from Minneapolis to Chicago?

A. Yes, sir.

Q. 13 cents?

A. I do not know what the rate is.

Q. Well, will you take my word for that?

A. Yes.

Q. And 12 cents from Omaha to Minneapolis?

A. Yes.

Q. That makes a 25-cent freight rate from Omaha via Minneapolis to Chicago?

A. Yes, sir.

Q. That is 25 cents. The direct rate from Atchison and Omaha to Chicago is 16 cents. Now, then, under the decision of the Interstate Commerce Commission, Minneapolis, being a rate-break market, can not have the benefit of transit, it must pay the full proportional rate of 13 cents from Minne- [fol. 122] apolis to Chicago, if it buys any grain at Omaha. Well, you needn't answer that question. It is in the record. That is all.

Mr. Scott: That is all I have, Mr. Examiner.

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Scott: We will call Mr. Owens.

E. C. Owens was sworn and testified as follows:

Direct examination.

By Mr. Scott:

Q. Your name is E. C. Owens?

A. That is right.

Q. You live at Leavenworth, Kan.?

A. That is right.

Q. What is your occupation, Mr. Owens?

A. Traffic manager.

Q. For whom?

A. J. C. Lysle Milling Company, Leavenworth.

Q. How long have you been with that company?

A. Ten years.

Q. In a general way, what are your duties as traffic manager?

A. Those duties that are customary to the handling of inbound and outbound tonnage.

Q. In that connection, you are familiar with the rates into and from and through Leavenworth, are you not?

A. Well, I would say I am familiar with them, yes.

[fol. 123] Q. And are you informed in a general way of the matters that are involved in this proceeding?

A. I think I understand the matters in this case; yes, sir.

Q. Now, in what business is the J. C. Lysle Milling Company engaged?

A. They are engaged in the manufacture of flour and mill feeds.

Q. And your mill is located where?

A. The mill is located at 512 Choctaw, Leavenworth, Kan.

Q. And what is its capacity?

A. The production or the elevator?

Q. Both.

A. The elevator capacity is 250,000 bushels; the mill production, 3,500 sacks. By the way, I might state we are just completing a 4-year improvement program which will enable us to increase that capacity to 4,000 sacks by July 1.

Q. Are you acquainted with the reasons that induced your company to locate a mill at Leavenworth?

A. It was interesting to me in Mr. Bindner's opening remarks, when he stated the Central Branch was completed in about the year 1880. That was the year the Lysle Milling Company started grinding wheat at its present location. I do not have any facts to bear out this statement, but I would imagine that would be one of the reasons why the mill was located at that point, having the wheat there in the back yard, and the natural movement toward Leavenworth and Kansas City.

[fol. 124] Q. Now, since you have been connected with the company, can you say whether or not the company in its operations has relied to any extent upon securing wheat on the Central Branch?

A. We buy all the wheat that we can off of the Central Branch at harvest time each year, more especially some years than others, depending, of course, on the quality of the wheat.

Q. You might also depending upon the size of the crop along the branch, too, might you not?

A. Sure.

Q. That is not an invariable quantity year after year, is it?

A. It is not.

Q. It is not an invariable quantity?

A. No.

Q. Some years you have good crops?

A. Yes.

Q. And some years you have poor crops?

A. That is right.

Q. Now, do you regard that as an important source of supply for your mill?

A. We regard the wheat off of that branch as an important source of supply.

Q. Why do you have that view of it?

A. When it gets to Leavenworth, it is maiden wheat.

Q. You say it is made into wheat,—you mean made into flour?

A. No maiden wheat.

[fol. 125] Q. Maiden wheat?

A. Virgin wheat.

Q. Now, you had better tell what virgin wheat is.

A. My understanding of virgin wheat is that it is wheat that hasn't hit a central elevator point to be mixed in with other wheat.

Q. It is the wheat as it comes from the farmer?

A. Yes.

Q. Through the small country station, is it?

A. Yes.

Q. And you prefer to get that wheat, if you can?

A. Yes.

Q. Now, are there other sources of supply available to Leavenworth at which you can buy virgin wheat with the same facility that you can off the Central Branch?

A. There is wheat that can be bought off the, what we call the main line of the Missouri Pacific,—that is, that line running from Osawatomie west to Pueblo, we do get some virgin wheat off of that line.

Q. By and large, the Central Branch is the best source of supply for that wheat?

A. For that type of wheat, yes.

Q. What is the position of your company with reference to what is proposed here?

A. Well, we have established business—I can specifically [fol 126] state Sioux City, Iowa, and Sioux Falls, S. Dak., where if this proposed route and rate were granted, we would be to a 6½-cent disadvantage over Omaha on the outbound shipment. What I mean to say is that if Omaha would get wheat from, say, Cawker City or any other point on the Central Branch west of Concordia, mill it into flour at Omaha, and go to Sioux Falls, S. Dak., or Sioux City, Iowa, their proportional rate from Omaha is 11 cents. If we took the same wheat from the same origin point and milled it into flour at Leavenworth, and paid on the same proposed rate, our rate is 17½ cents. At 6½ cents a hundredweight we would be to a disadvantage over Omaha, one of our competitors.

By Exam. Stiles:

Q. That is a situation which already exists with reference to wheat off of the Rock Island which is just north of this branch of the Missouri Pacific, is that correct?

A. I imagine that that is correct, yes.

By Mr. Scott:

Q. Well, you know that the rates inbound are the same, don't you, from these Rock Island points the Examiner mentioned, the same to Leavenworth as to Omaha?

A. Is he talking about the Belleville line?

Q. Yes.

Exam. Stiles: You say you already have that disadvantage you say you would be under if the request of the complaint were granted,—you already have that disadvantage, as you would term it, from the points on the Rock Island [fol. 127] north of this branch of the Missouri Pacific?

A. I am not familiar with what the rates are from the Belleville line to Omaha. Are they the same as Kansas City?

Mr. Kuhn: Yes, they are.

A. Then we are on an equal basis now.

By Mr. Kuhn:

Q. Inbound?

A. Inbound.

Q. The Examiner says when you go through to Sioux Falls you have got a disadvantage against you such as you don't want to happen on the Central Branch; that is true, isn't it?

A. On the outbound movement.

Q. Let's think of a through movement. Let's think of a point on the Rock Island where the rates to Omaha and Leavenworth are the same. You know you can't take that wheat and go to Sioux Falls with it on the same basis as Omaha, can you?

A. No, we are 6½ cents over Omaha.

By Exam. Stiles:

Q. Do you buy wheat from the Rock Island branch?

A. We don't get any wheat off of the Belleville line of the Rock Island. An occasional car, a very, very small amount. I don't think a car has come into Leavenworth off the Rock Island for 3 months.

By Mr. Scott:

Q. Now, Mr. Owens, I would like to have you again refer to the rates from Cawker City. That is a point on the Central Branch?

[fol. 128] A. Yes.

Q. And the rate into Omaha is 18 cents?

A. Yes.

Q. The rate from Sioux Falls to Sioux City is 17½ cents; that is 35½ cents through?

A. That is right, I believe.

Q. Now, the same rate is available from Omaha today, is it not?

A. From Cawker City?

Q. Yes.

A. Yes.

Q. Now, suppose the same rate to Omaha were reduced 6½ cents, then the through rate via Omaha would become 29 cents, wouldn't it?

A. That is right.

Q. Now, if that through rate were published as a through rate and applied through Leavenworth, could you transit on that rate, and thereby meet that competition?

A. We don't have any transit at Leavenworth. We are on a proportional rate, and we would still have to use our 17½-cent proportional rate.

Q. You would still be on the 35½-cent through rate?

A. That is right.

Q. Anything further you want to say to the Commission on this matter?

[fol. 129] A. I know that we had off of the Burlington around Grainton—I don't know what line they call that on the Burlington—if this wheat would move to Omaha under this proposed plan, and we ran short of that particular type of wheat and had to get it from that Burlington line, it would cost us from 2 to 6½ cents over our present rate to get it into Leavenworth.

Mr. Scott: You may cross-examine.

Cross-examination.

By Mr. Kuhn:

Q. You stated that you did not get any wheat off the Rock Island road, although your rate to Leavenworth and Omaha are one and the same. Do you know why that is?

A. The Rock Island doesn't run into Leavenworth, and the tonnage would be of no particular benefit to us.

Q. Now, you refer to Sioux City. You know that Sioux City has one of the largest mills in the country. Does your business amount to a great deal up to Sioux City and Sioux Falls, that you stress it so strongly here?

A. We have several cars a month at each point, Sioux City, Iowa, and Sioux Falls, S. Dak., and that business has been established for many years.

Q. Now, can't you get your wheat off of the main line of the Missouri Pacific where the rate is 6½ cents less than the rate to Omaha?

A. I believe I stated that we got some wheat off of the main line of the Missouri Pacific.

[fol. 130] Q. Yes.

A. On that basis.

Q. Then your through rate is the same as it would be via Omaha?

A. On that same wheat?

Q. Yes.

A. Yes, sir.

Mr. Kuhn: That is all.

Mr. Scott: That is all.

Exam. Stiles: You are excused.

(Witness excused.)

C. F. Real was sworn and testified as follows:

Direct examination:

The Witness: My name is C. F. Real. I am traffic commissioner for the Topeka Chamber of Commerce and the Topeka Traffic Association. I have been in my present position since 1928. Prior to that time I was with the same two organizations as rate clerk and secretary for a number of years. Prior to that time I was with the Rock Island Railroad, in positions ranging from O. S. & D. clerk to agent. Prior to that time I was with the Santa Fe Railroad in positions ranging from office boy in the general passenger office to agent. Practically all my life has been spent in transportation matters.

Our Topeka people are opposed to this complaint because [fol. 131] of the opening of the interior routes. Not long ago one of our Kansas mills endeavored to open a route in Kansas to shorthaul the Union Pacific. We opposed that. We think if they start opening these interior routes, any of them, that we are going to have a great many of them opened. For that reason we are opposed to them.

Exam. Stiles: Explain for the record just what you comprehend in the term "interior routes."

A. Well, for instance, let us take the Missouri Pacific. It would—

Exam. Stiles: In other words, if the term would be broader than we have in this case, I want to know just what you mean by it.

A. It would include all the interior routes where there are track connections. For instance,—I was going to give it to you a little later, but I will give it to you right now, Mr. Examiner.

Off of the Missouri Pacific Railroad, Concordia and west, there is a track connection at Concordia with the Union Pacific. The wheat could be delivered to the Union Pacific at Concordia and hauled directly through to Topeka or Kansas City or St. Joe or Atchison or Leavenworth. There is also a track connection at Frankfort, Kan., with the Union Pacific. That wheat would move Missouri Pacific to Frankfort, and Union Pacific Frankfort to Topeka or Kansas City.

[fol. 132] At Norton, Kan., there is a junction with the Burlington. Traffic from north and west of Norton would move to Norton over the Burlington, Rock Island to Topeka or Kansas City. From points on the Burlington west of Superior, traffic would move by the Burlington to Superior, Santa Fe or Missouri Pacific to Kansas City.

There is also a route connection at Beloit, Kan., between the Missouri Pacific and the Union Pacific, and there are any number of routes that could be opened even from Nebraska points through interior combinations, if interior-junction routing applied. From points on the Missouri Pacific to Topeka, the Missouri Pacific highline, the Missouri Pacific gets to haul all the way. We pay the combination over the river, the local in to the river, plus the local from the river to Topeka. Certainly if interior routes are to be opened, we are going to ask for routings that would allow us to get the wheat direct from the Kansas points via the direct line to Topeka, and avoid paying that extra 12 cents.

Topeka has two public elevators, with a combined capacity of 2,350,000 bushels. It has one flour milling company, which operates two mills with a total storage capacity of 525,000 bushels. It has one corn processer, with a capacity of 70,000 bushels. Our total storage capacity at Topeka is 3,045,000 bushels.

We have one flour mill with a capacity of 3,500 barrels [fol. 133] per day. The corn processer has a capacity of 5,000 bushels per day grind. The small mill we have has a capacity of 50 tons of feed per day.

Now, in the counties in which the Missouri Pacific, Concordia and west operates, during the year 1939 there was produced 1,202,765 bushels of corn, or approximately 802 cars of 1,500 bushels each. There was also produced 5,912,662 bushels of wheat, or approximately 3,695 cars of 1,600 bushels each. During a normal year our processers report that they receive from 200 to 400 cars a year from the Missouri Pacific high line. By the "high line" I mean, Mr. Examiner, Atchison west to Lenora and Stockton. During the past few years, of course, times have not been normal, and they have not gotten as many cars from that territory as they usually would.

During 1944 our corn processor reports he received 186 cars, in 1945 92 cars. One public elevator received during 1944 116 cars from one station, and 89 during 1945. He operates an elevator at that one station.

Our people go every way, of course, for grain, depending on the season and the production, but year after year they get some wheat or some corn from the Missouri Pacific high line.

I prepared one exhibit, Mr. Examiner. This exhibit was prepared by me, and to the best of my knowledge it is true and correct.

[fol. 134] Before going into the exhibit, I might give you a few mileages via some of these junction points I was talking about a while ago, showing what the distance would be via Topeka or Kansas City as compared with the direct straight-line distance.

St. Francis, Kan., on the Burlington, the one-line direct distance is 479 miles, while via the C. B. & Q. to Hanover and the Union Pacific, 462 miles.

C. B. & Q to Superior and the Santa Fe, 499 miles.

C. B. & Q. to Fairbury and Union Pacific, 461 miles.

From Stockton on the Missouri Pacific direct, I figure 296 miles to Kansas City; while via the Missouri Pacific to Concordia and the Union Pacific would be 310 miles, and via Missouri Pacific to Concordia to Frankfort and Union Pacific, 304.5 miles.

Overland, Kan., on the C. B. & Q., by Burlington direct, 411.6 miles; by C. B. & Q.-Norton and the Rock Island, 370 miles, the joint line being shorter than the one-line distance.

Topeka, being located where it is, and our storage capacity being so small, it is necessary after the first general rush of grain to go to the markets to get our grain. A good bit of this grain that comes from the Iowa line first moves into the market and is stored there, and then is purchased from the market and later moved to Topeka.

I would like to have this exhibit marked.

[fol. 135] (The distance statement referred to was marked as "Interveners' Exhibit No. 30, Witness Real," for identification.)

Exhibit No. 30 consists of three pages and a map. On page 1 I have shown the distances, one-line, from representative Missouri Pacific origin points to Atchison, Leavenworth, St. Joseph, and Kansas City, and the average to the four crossings. ~~I have~~ also shown the distance from the same origin points to Omaha, using the direct-line distance, the distance via the Missouri Pacific to Concordia, C. B. & Q. to Beatrice, Union Pacific to Lincoln, and the C. B. & Q. That is, what would be known as the shortest possible route. I have also shown the distance via Missouri Pacific to Concordia on the Burlington. The same rates applying from the origin points to the four Missouri River crossings, we think it is only fair you use the average distance to the four crossings rather than the distance to the more distant crossing in comparing the distances to Omaha.

Page 2 simply shows the tariff authorities and the routes.

Kansas is blessed with a great many roads and highways. On page 3 I have shown what the cross-country haul would be from the Missouri Pacific stations to points on the Rock Island, the Rock Island points that take the same rates to Omaha as to Kansas City.

For instance, from Lenora, Kan., to Dellvale, the haul [fol. 136] would only be 15 miles. The greatest distance I figure on the representative points I have shown is from Osborne, Kan., to Smith Center, a haul of only 25 miles.

I have next shown a statement of the cross-country distances from stations on the Union Pacific Railroad to points on the Rock Island. Luray, Kan., as representative to Smith Center, the distance is only 49 miles.

Next I have shown the statement of the cross-country distances from stations on the Union Pacific Railroad to stations on the Missouri Pacific. Even from Salina to Concordia—and Salina is a large grain storage point, known as one of the semiterminal markets—to Concordia is only 58 miles.

I am not a grain man, Mr. Examiner, but from what I have heard around at the many grain hearings, if the price would be very much greater at Omaha than at Kansas City, it would certainly draw that grain across country by truck to where Omaha would be the same rate as would Kansas City.

Next, I have a map of the State of Kansas. The black lines are the Burlington route in Kansas; the orange, the Rock Island; the green, the Missouri Pacific; and the red, the Union Pacific. The Missouri Pacific grain on the high line would move——

Exam. Stiles: On mine the Missouri Pacific is blue.

A. Is that blue? I call it green.

Grain moving on the high line of the Missouri Pacific [fol. 137] would move through the markets, either direct or stone, and then would go on to Topeka or Colorado or south, depending on wherever the market for the grain or the product was. The Missouri Pacific, of course, would get the long haul, and get the haul all the way.

By Exam. Stiles:

Q. Would that be under transit?

A. At Topeka?

Q. Yes.

A. It would be under transit to Topeka, yes.

Q. Transit at Kansas City?

A. Yes. It would be under storing at Kansas City. We pay combination. There is no proportional rate from the lower Missouri River markets to Topeka.

Q. There is no through rate from these points to Topeka, not by way of Kansas City?

A. No, it is combination over St. Joe or Kansas City or any one of the lower four crossings. Now, if this grain should get up to Omaha,—and our people buy quite a bit of grain in Omaha during a normal year,—then we would have to pay 18½ cents to get it down from Omaha to Topeka, in addition to the inbound rate to Omaha.

Some people complain of the difference between Omaha and Minneapolis. If they got the grain to Omaha on the through rate, they could go into Minneapolis for 6½ cents less than our people could out of Kansas City or any one of [fol. 138] the four crossings.

I wish to offer exhibit No. 30, Mr. Examiner. That is all I have.

Exam. Stiles: Exhibit 30 is received in evidence.

(Interveners' Exhibit No. 30, Witness Real, was received in evidence.)

Exam. Stiles: Any cross-examination?

Mr. Kuhn: I have a few questions, Mr. Examiner.

Cross-examination.

By Mr. Kuhn:

Q. You stated, Mr. Real, just a moment ago that all of the wheat that you got at Topeka going via the markets was a combination over the markets?

A. From the high Missouri Pacific points.

Q. You mean by the high line?

A. The Central Branch, described as the Northern Branch.

Q. Don't you have arrangements at Topeka on business originating on the high line going on the combination to Arkansas and Memphis?

A. Yes, sir; it is still on the combination over the river.

Q. Over the river?

A. Yes.

Q. And they haul that 266 miles for nothing, up to Omaha and back again?

A. They don't do that. It would go via the Rock Island or——

Mr. Ware: How much?

[fol. 139] Mr. Kuhn: 133 miles each way.

A. Of course, I did not say how much grain moved to Memphis on Missouri Pacific billing, because I don't know.

By Mr. Kuhn:

Q. Now, you made reference also to the average distances to the four Missouri River markets, that the distance should be averaged instead of taking Kansas City as against Omaha?

A. I think that is right.

Q. Did you ever hear of Nebraska City?

A. Yes, I have heard of it.

Q. That is quite an active market, 50 miles south of Omaha.

A. It is not a proportional rate point, though.

Q. No, it is not a proportional rate point, but it is an active market. Now, the same rate applies from Lenora to Nebraska City as applies to Omaha; so under your theory when we figure distances we ought to use Nebraska City, 50 miles south of Omaha, and compare it on an average with Omaha.

A. No, I don't think so, because your rates from Nebraska City are not the same as from Omaha.

Mr. Kuhn: I know you wouldn't think so. That is all.

A. Not under those circumstances I wouldn't, Mr. Kuhn.

Mr. Kuhn: That is all.

Exam. Stiles: You are excused.

(Witness excused.)

Mr. Scott: I will be sworn.

[fol. 140] Walter R. Scott was sworn and testified as follows:

Direct examination.

The Witness: My name is Walter R. Scott. I reside in Kansas City, Mo. I am transportation commissioner of The Board of Trade of Kansas City, Mo., which is a voluntary association of grain merchants, flour millers, and feed manufacturers located in and doing business in Kansas City, Mo., and Kansas City, Kan. It is the governing body of the Grain Exchange of Kansas City.

Kansas City is a grain market in which are located a number of grain merchants, many of whom operate terminal storage elevators, a number of flour milling concerns operating flour mills there, and a number of processers operating commercial feed manufacturing plants, wet corn processing plants, and alcohol plants.

The Kansas City market is of the same general type as Omaha and the other Missouri River markets, namely, St. Joseph, Atchison, and Leavenworth. These markets are all in competition with each other. The dealers in them are in competition with similar dealers in the same markets and in the other markets.

This Central Branch is an important source of supply of grain for the Kansas City market. The Board of Trade of Kansas City has intervened in opposition to the complaint [fol. 141] and on the side of the defendants.

I have prepared or caused to be prepared under my supervision a number of maps and statements which I ask, be accepted in evidence. This material is all true and correct, to the best of my knowledge and belief.

(The exhibits referred to were marked as interveners' exhibits Nos. 31 thru 50, Witness Scott, for identification.)

Exhibit No. 31 is an outline map of the railroads which are involved in this proceeding. This map was drawn by a professional draftsman, and drawn to scale, so that it gives a true impression of the geographical location of the various lines of railroad.

It has already been pointed out that there are three lines of the Chicago, Burlington & Quincy Railroad by which freight may be moved from Concordia, Kan., to Omaha, Nebr. This map shows the three.

Now, Exhibit No. 32 is a statement of two pages, entitled "Freight Train Schedules of Chicago, Burlington & Quincy Railroad from Concordia, Kan., to Omaha, Nebr." This statement shows the schedules available over the three routes that I have referred to. And at the bottom of page 2 is a statement showing the mileage of the various routes.

You will notice that Route 1, which runs through Table Rock, requires four distinct train operations, and involves [fol. 142] elapsed time of 34 hours and 45 minutes. The distance over this route—this is the shortest route—is 236.7 miles, according to the statement.

On page 2, route 2 is shown, via Crete and Lincoln. The distance in route 2 is the shortest in mileage, 198.2 miles. That requires three train handlings, and elapsed time of 34 hours and 45 minutes.

Route 3 is the longest route. That involves——

Exam. Stiles: But the shortest in time?

A. But the shortest in time. That route involves branch-line operation to Wymore, where it picks up the main line of the Chicago, Burlington & Quincy from the west, crossing the Missouri River near Napier, Mo. At Napier it meets the main line of the Burlington, which runs from Kansas City to Omaha. Although the longest route, as you say, Mr. Examiner, it is the shortest in time, 22 hours and 5 minutes elapsed time from the time the Burlington takes hold of the train at Concordia. The distance of 264.7 miles is not greatly shorter than the distance over the Missouri Pacific all the way of 311.6 miles. The map, exhibit No. 31, shows the route of the Missouri Pacific to Atchison and north over the main line from Kansas City via Atchison to Omaha.

Exam. Stiles: Your exhibit doesn't give the tariff authority for the distance. Can you give us that?

A. They are on several later exhibits.

[fol. 143] Exam. Stiles: All right.

A. Exhibit No. 33 is a statement showing the production of grain in the counties served by the Northern Kansas division of the Missouri Pacific. This line involved here is sometimes called the Central Branch, and again called the Northern Kansas division.

It will be noticed there in the last figure available for 1944 that the production of wheat in the counties east of Concordia was in round figures 5½ million, while west of Concordia it was 12,300,000 bushels. The production west runs fairly uniform at about 70 percent of the total production along the line.

Page 2 shows the total coarse grain production for the last year we had, of 1943. Now, these figures are the figures of production, but inasmuch as the coarse grains are largely fed on the farm, it being estimated that only 15 percent on the average leaves the farm to commercial channels, the indicated volume of movement would be comparatively small. If we apply 15 percent to the aggregate figure west of Concordia, here shown as 19,646,000 bushels, you get a figure of 3 million bushels, compared to the wheat production of 15½ million bushels.

By Exam. Stiles:

Q. These counties are not wholly dependent upon the Missouri Pacific for rail outlet?

A. That is correct. That is as nearly as we could allocate the production to the railroad, however.

[fol. 144] Now, the statistics shown here rather support the data already available in the record concerning the importance of this line east and west of Concordia, in so far as grain is concerned.

We have another figure available, which is the number of country elevators. When grain is sold by the farmers, it is sold to a local elevator, a local grain merchant at his shipping point, who operates what we call a country elevator. East of Concordia on this line of railroad there are 38 such elevators, with an aggregate capacity of 713,000 bushels, or an average of 18,700 bushels. West of Concordia there are 67 such elevators, with an aggregate capacity of 1,626,000 bushels, or an average of 24,300 bushels. Therefore, not only there are more houses, but there are larger houses, which of course is to be expected from the data reflecting the crop production.

Now, in the statements which we have prepared and which we expect to offer in the record, we have to a large extent used the Western Trunk Line scale as a standard of comparison, and exhibit No. 34 is a statement of the scale as originally prescribed, running up to 850 miles, with a correction in the last column to allow for the increase permitted in Ex parte No. 123.

Q. You call that the Western Trunk Line scale. Is that what was called the "Interior scale"?

A. That is correct.

[fol. 145] Q. Which the Commission later abandoned and did not prescribe in the Second Report?

A. That is right.

Q. Disregarded it?

A. But it has value here, for the reasons which I will now give you, if you please.

This western Trunk Line Interior scale was prescribed in the First Report, 164 ICC 619, at page 822, and on the Report on Further Hearing, as you say, it was not again prescribed. However, the Commission indicated in that Report on Further Hearing that the underlying scale basis for determining the key-point rates in Western Trunk Line territory was a scale related to this Interior scale.

On page 344, the Commission stated that the Interior scales were approximately 10 percent higher than the key-point rates prescribed in the respective territories.

And then again, at page 374, it was indicated that the key-point rates from producing points to the various rate-break markets were usually on a basis approximately 91 percent of the Interior scale, which is simply stating the relation in reverse.

Now, inasmuch as the key-point rates originally prescribed were re-prescribed, the underlying scale is evident, even though the Interior scale was not re-prescribed as such. Therefore, we have taken it as a standard of comparison, [fol. 146] and I don't know of any better standard to be used for the purpose.

Q. Didn't the Commission in two later reports disregard this scale?

A. It did, and in two later reports they said because the scale was not re-prescribed it has no probative value; but in other reports they have referred to it without that condemnation, so we are on both sides of it, so far as the reports are concerned.

But I think the Commission in making those statements concerning the probative value of the scale, must certainly have overlooked the fact that I have just referred to, that they had used this underlying scale to determine the key-point rates which were re-prescribed.

Q. I don't think you said the Commission said they had used that scale. You simply said, as I understood you, that the Commission said that on an average there was a certain percentage relation.

A. No, they said this, in the references I gave you, that the Interior scales were made by adding 10 percent to the underlying scale which they used to arrive at the key-point rates. Now, if you turn that relation around in reverse——

Exam. Stiles: You gave the page reference, didn't you?

A. Yes, sir; I have given the page reference.

Exam. Stiles: All right.

A. Exhibit No. 35 is a statement of 12 pages, which details [fol. 147] the rates from all points on the Central Branch to the five Missouri River markets involved.

By Exam. Stiles:

Q. When you say in the title "Western Trunk Line Scale," you refer to this scale which you have on exhibit 34?

A. That is correct.

Q. Proceed.

Now, in this compilation, which is complete in that every point of origin along the line in Kansas is shown, all the markets are shown, we have set up here, for the information of the Commission, both the distances determined according to the absolute formula, and also the shortest tariff distances, because that question is important here by reason of the nature of this case. And we, as I have said, have shown both the section Concordia and east of that section, which is brought into issue by the complaint, namely, west of Concordia.

The method of making the computation may be determined on pages 2 and 3, where we have set up the rates to Omaha. Now, in columns F and G we set up the scale that I referred to, on the basis of both the absolute short-line distance and the shortest tariff distance; and then in columns H and I we have shown the percentage relationship the actual rates bear to the scale rates for those distances.

Q. Where you say "absolute" miles, you mean the shortest distance that can be figured by which there are connections?

[fol. 148] A. That is correct.

Q. Regardless of how many carriers are employed?

A. That is correct. That is what we call the absolute short-line distance.

Q. And the tariff miles column is the shortest route the tariffs at present authorize?

A. That is correct. And of course, these rates here from the Branch to Omaha are authorized for application over the Missouri Pacific Railroad only, so that these distances in column C are the distances over the Missouri Pacific via Atchison, whereas the other distances are the shortest that can be figured according to the formula that the Examiner stated.

Now, it will appear in the two right-hand columns, taking the east end of the line first, that if you use the actual railroad mileage over which the rates apply, these rates average 104.7 percent of the scale; but if you use the absolute formula, then they are 123.5 percent higher.

On the next page, the averages for the section west of Concordia are shown, and then the two of them are brought together in the last picture.

Q. Now, I call your attention next to pages 4 and 5, where similar information concerning Atchison is shown. And here you will notice that the short-line distance on the absolute plan is the same as the short tariff distance. So we have this situation, that Omaha is able to figure a materially [fol. 149] shorter distance because of the way the rules run under the absolute plan, while Atchison has the advantage of no such fictitious situation.

Now, therefore, the averages are the same, and for the section east of Concordia in both methods of figuring the rates average 116.3 percent of the scale.

I will call your attention now to the figures at the bottom of page 5, where the two sections are averaged together, and on the basis of the actual authorized tariff distance the rates to Atchison average 107.8 percent of the scale, as compared to Omaha, shown on page 3 at 103.4 percent of the scale. The other markets are shown here, and all the information is brought to a recapitulation on page 12 for a quick view.

Exam. Stiles: Will you pardon me, Mr. Scott? We will have a short recess at this time.

(A short recess was thereupon taken.)

Exam. Stiles: We will resume.

The Witness: The exhibit shows that it is only to Omaha that the marked difference between the absolute short distances and the tariff distances occurs. Taking Beloit, for example, the distance to Omaha over the absolute short-line is 216 miles, and over the short-tariff distance is 341 miles, a difference of 125. As I have pointed out, to Atchison there is no difference whatever between the two distances. The same thing is true to Leavenworth. To St. Joseph there is [fol. 150] only 1 mile difference, and to Kansas City, 9.

Taking the short-tariff routes, now, from Beloit the distance to Atchison is 184 miles. St. Joseph is 22 miles farther, Leavenworth is 21 miles farther, Kansas City 46 miles farther, and Omaha 157 miles farther. These differences apply, of course, to all points west of Concordia.

Now, in other exhibits which I have here, the distances to the four lower Missouri River markets, by which I mean Atchison, Leavenworth, St. Joseph, and Kansas City, are in some cases averaged.

I want to call your attention to the fact that it is the practice to apply the same inbound rates to the four markets and the same outbound rates from the four markets, except for a fairly small area around each market. This the Commission referred to in the General Grain Rate Case I referred to, at page 523 of the report, in volume 173, so we concluded that this fact must be taken into account in considering the rates that are here.

I have called attention to the fact that there are differences in the percentage relationship of the present rates to the Western Trunk Line scale rates, and there are also differences in the rates as between the four Lower Missouri River markets. This condition was before the Commission in the General Grain Rate Case, and at page 375 of volume 205, on further hearing, the Commission discussed the matter and referred to the factors which bring about varia- [fol. 151] tions. They are principally cross-country competition, grouping, fourth-section requirements, the rate-break combinations. These influences may cause a substantial departure from an exact distance formula.

I refer to these matters because the rates which are involved here are part and parcel of a broad fabric of rates which was set up by the Commission in what we refer to as the Grain Case, docket 17000, part 7.

Would you like those citations put in, Mr. Examiner?

Exam. Stiles: Yes.

A. The original decision is at 164 ICC 619; supplemental report, 173 ICC 511; the report of the Commission on further hearing, 205 ICC 301; and a supplemental report, 215 ICC 83.

In our opinion, these rates should be determined with reference to the action of the Commission in that case.

Now, Mr. Real has called attention to the railroad situation in the State of Kansas, and I wish to make some reference to the condition which is presented there as it bears on this case. It will be noted from his map, in exhibit No. 30, that Kansas is traversed by east-and-west railroads which run roughly parallel to each other, and this condition has brought about a grouping of the rates from Kansas origin points. This came about naturally. In the '90's, the Kansas Railway Commission promulgated a scale of rates which had the effect of being carried across the state on the basis of distances to Atchison from the [fol. 152] very points of origin here involved. The reason for that condition is that Atchison is the nearest of the several Missouri River markets to the points of origin on this line, and by cross-country checking the rates spread from one parallel line to another, so that the result was a series of north-and-south groups which still prevail, and which have been approved by the Commission in the Grain Case.

Exam. Stiles: Do you want to give the page reference?

A. Page 663 and 664 in volume 164.

The line of the Chicago, Rock Island & Pacific which lies north of the Central Branch has been referred to as bearing rates from points Belleville and west which are the same to all the markets, Omaha on the north and the four lower Missouri River markets on the south. I wish to state the short-tariff distances from Belleville, which is the junction point of the two lines. To Omaha, 149.5 miles; to St. Joseph, 190.7 miles; to Kansas City, 202.9.

Exam. Stiles: Do you have the tariff authorities there?

A. No, I haven't got them. We will furnish them, however.

Here again is another illustration of the departure from a straight mileage basis.

Now, in studying the railroad map, you will find that brought about these departures is the fact that these east-and-west lines are intercepted by north-and-south lines. So, for example, from Frankfort, a point on the Central [fol. 153] Branch, the short-line distance to the river is to Atchison, but the Union Pacific drops south from Frankfort to Topeka to reach Kansas City. The Union Pacific does not reach Atchison, and therefore carries the same rate from Frankfort to Kansas City as the Missouri Pacific carries from Frankfort to Atchison.

I cite these various factors as entering into the situation which we have today, where the rates are grouped, and distances to quite a considerable extent are ignored.

Now, you will find in the exhibits here that the rates on points from the Central Branch to Atchison are on a higher basis with reference to the Western Trunk Line scale than are the gathering rates generally. That is because in a group system of north-and-south groups, and with the shortest distance to the river, those group rates would naturally reflect a high relation to the scale.

The reference you requested, Mr. Examiner, with reference to the distances from Belleville are C. R. I. & P. tariff ICC No. C-11924.

Now, another factor which enters into the determination of the rates in the General Grain Rate Case is the fact that the rates up to the river markets are what was called in the general case at times "gathering rates," since they were merely the rates upon which the grain originated. They became part of the through rates to points beyond the markets, whether the grain was shipped direct through [fol. 154] to destinations east, or whether transit was had at the river.

Exhibit No. 36 is a statement of one page, entitled

"Local Consumption of Wheat in the Kansas City and Omaha Metropolitan Areas in Relation to Receipts." You will find the significant figures are at the bottom.

In the case of Kansas City, we took last year's receipts of wheat and last year's receipts of flour and converted the bushels of wheat to equivalents of flour, and then we related that to the consumption of flour in metropolitan Kansas City, and found that only 2.3 percent of the wheat and flour coming to Kansas City was eaten by the inhabitants of Kansas City. For Omaha we have a figure of 4.9 percent. I did not have available the receipts of flour at Omaha. If there were any flour received, this figure would be diminished accordingly.

By Mr. Stiles:

Q. Now, let me understand this. You say "was eaten." This doesn't include wheat that is used there to manufacture into alcohol or something else?

A. No, no; this is only the consumption of flour. I don't have any figures on the use of these grains for alcohol.

In the Grain Case, the Commission in a footnote at page 349, volume 205, stated that: "Although the inbound rates to the rate break markets are published as flat rates, the fact is that about 95 percent of the inbound grain to these markets is subsequently shipped out as grain products."

Therefore, I make the point here, Mr. Examiner, that [fol. 155] there is more before the Commission than merely consideration of the rates and distances from these points of origin to Omaha as against Kansas City, which is the case presented by the complainant, as I understand it. I make the point that you have got to follow the grain on through and consider the through rates of which these rates are part and parcel. They are components of the through rates.

Now, another thing I want to call your attention to is a fact that enters into this picture, and that is that the principal grain involved here is wheat, and that the heaviest movement of wheat in the form of wheat or its products is into the east. That necessarily is so, because of the fact that the great concentration of population is east of the

Mississippi River, and therefore the natural and normal flow of the surplus wheat of the middle west is into those sections where the great consumptive demand is. And this fact was also taken into account by the Commission in the Grain Case. I will refer you there, Mr. Examiner, to page 632 of volume 164.

So the Commission, having these different conditions before it, made this statement in the Grain Case:

"The question here is primarily the inherent reasonableness of the rates, not only to the rate-break markets, but also through those markets to the final markets or other destinations."

Page 343, volume 205.

[fol. 156] This all leads up, of course, to the fact that I am talking about at present, some figures here carrying these rates on through.

Exhibit No. 37 sets out the tariff rules governing the application of proportional rates in so far as they are pertinent to what I want to show here. This is a complete and accurate presentation of the section it purports to be. The thing I want to call attention to here, Mr. Examiner, is that it is provided in the tariffs that the proportional rates apply on through continuous shipments originating beyond points from which proportional rates are published; and also that they apply on traffic which has been accorded transit privileges at these proportional-rate points. And thereby we hook up the inbound local or flat rates with the proportional rates.

In the Grain Case, the Commission specifically found that these grain rates should be constructed on rate-break combinations, and forbade the carriers to maintain rates as through rates to points east of the markets which were less than such combinations, so that by these provisions we are establishing the through rates. It follows from this, of course, that if the rates to Omaha are reduced, the through rates to a great many destinations beyond will be reduced.

Now, at the bottom of this page I am setting forth another tariff provision, which I have headed "Transit Restriction." That is my own language.

[fol. 157] Very briefly, this is:

"From points from which proportional rates are published to the transit destination, no basis lower than such proportional rates will apply under transit."

Now Atchison is a proportional-rate. It is subject to this transit restriction. And one of these rates involved here are combinations on Atchison, because of the things I have been stating, first, that the through rates are to be made by combinations on the markets; and second, that having been so made, the market may not operate under transit on any other basis, so that if the Commission here should reduce the rates to Omaha over this line of the Missouri Pacific through Concordia and the Burlington, and then the Missouri Pacific should meet those rates over its own line all the way, the intermediate market of Atchison would be unable to participate in those rates under the usual transit regulations. They would still have to pay the present rates. That is required in the Grain Case and it is in the tariffs.

Exhibit No. 38 is a statement of four pages which sets forth the proportional rates on grain and the distances from Missouri River market points. We have set forth here all of the proportional rates prescribed by the Commission for application in Western Trunk line territory, in so far as the Missouri River is concerned.

Now, to compare the measure of these rates from the [fol. 158] various markets, we have shown in the right-hand column the earnings per ton per mile; and then in part 2 on the second page we have averaged the rates from the four lower Missouri River markets, and find that the average earnings under those rates is 7.9 mills, while from Omaha the average is 7 mills.

Now, reference has been made here to Minneapolis. The proportional rate from Omaha to Minneapolis yields 7 mills per ton per mile. The proportional rate from Kansas City and the other lower crossings, although the distance is longer, yields 8.3 mills per ton per mile. That violates the familiar rule that as distance increases, the rate per ton per mile should decrease. The reason for that, of course, is that these proportional rates are part and parcel of the through rates which made up the general fabric of the rates.

Now, that relationship of proportional rates puts Atchison and the other lower markets at a disadvantage. That disadvantage is offset, of course, by the differences in the inbound rates, which match these differences in the outbound rates, so that the combinations are equalized through all of the markets.

Exhibit No. 39 is a map of Western Trunk Line territory east of the Missouri River showing proportional rates on grain from Kansas City. Now, we offer this map to show that all of the Missouri River territory east of the Missouri River is covered with proportional rates, and these rates, [fol. 159] although they are stated from Kansas City, apply also from Atchison and other lower markets, except for a small area near to each. We have also, of course, included here Chicago, Peoria, and St. Louis, which are the gateways to the east, so that it appears that the entire territory from the Missouri River to the Atlantic coast is blanketed with proportional rates from Atchison, as well as from these other markets. There are no joint through rates. None is permitted from Kansas and Nebraska and Colorado lower than these combinations.

Exhibit No. 40 is a similar map which shows the grouping of the proportional rates out of Omaha.

If you will notice, on this map, which is No. 40, it is a very large group to which the proportional rate is 12 cents, in which is located Minneapolis. By referring back to the other map, exhibit No. 39, you will see that from the lower Missouri River markets the rate is 18½ cents to most of the points in that group.

Exhibit No. 41 is a statement of 10 pages which, according to the title, contains rates on grain and distances from points on the Northern Kansas division to Chicago, St. Louis, and Minneapolis. Now, here, as I have stated we would, we connect up the inbound or gathering rates with the outbound proportional rates. This is in two parts. Because of the fact that we have this question over the use of the absolute short line distance as against the shortest [fol. 160] tariff distance, it is put on both bases.

In part 1 we have taken Yuma. Yuma, Kan., is the first station west of Concordia, so the differences in distance which appear here as to Yuma apply to any point west of Concordia, Kan.

The first section shows the situation from Yuma to

Chicago. The shortest distance that can be figured is 620 miles, and the rate from Yuma to Chicago is the combination on the Missouri River points. The combination on Omaha is higher than the combination on Atchison. And by reason of the difference in the inbound rates and the proportional of outbound proportionals, Omaha as to this traffic is at a disadvantage of 6½ cents per 100 pounds as against the through rate made up on combinations over the lower Missouri River markets. This difference in distance would not in and of itself justify a spread of 6½ cents.

The case of Peoria, in the next block, the difference there shown is 54 miles, with a 6½-cent disadvantage to Omaha.

When you come to St. Louis, the difference is 8½ cents in rate, and 128 miles difference in distance.

These figures by themselves——

Exam. Stiles: 128?

A. Yes; 476 off from 604.

Exam. Stiles: Doesn't the exhibit show 136?

A. Well, just above that is 8. You have to take that 8 off [fol. 161] when you want to get the figure against the shortest distance. These are the figures here I am discussing, right here.

Page 3 shows the situation at Minneapolis. There the rates via all the markets are the same, 34½ cents, which of course is the through rate applicable over any route via which the rate applies. In this instance, the distance via Omaha is only 5 miles longer than over the shortest possible distance, and via the lower Missouri River markets it ranges from 71 to 147 miles difference.

Now, the application of Omaha here would give them a rate of 28 cents as against the rate of 34½ cents now available over the other markets.

If this situation stood alone, there might be some justification for this condition, but I will presently show you other things which bear upon this situation.

Exhibit No. 42 carries a through rate showing the situation in a somewhat different way. The exhibit just referred to, namely, exhibit No. 41, dealt with the markets of Chicago, Peoria, St. Louis, and Minneapolis. This exhibit No.

42 takes up station by station the points along two of the routes which run from St. Joseph to Minneapolis. The proportional rates which made up these through rates are those shown in the maps, exhibits Nos. 39 and 40. On the first page you can supply those figures, if you will.

Exam. Stiles: The blanks on the title page of exhibit [fol. 162] 42 in the note should be filled in with the numbers 39 and 40. Will the reporter please see that that is done in the official copy?

A. On page 2, we start out on the line of the Chicago and Western Railroad, which is one of the reasonably direct lines from the lower Missouri River to Minneapolis, and follow it station by station from Dean, Mo., which is just outside of St. Joseph, to Minneapolis. I call your attention to a point about the middle of the page, Diagonal, Iowa. The through rate to Diagonal from Downs, which is taken as a representative origin, is 27½ cents, and the short distance is 312 miles, figured through St. Joseph. Next to that we show what the distance and rate are through Omaha,—distance, 488 miles; the rate, 34 cents.

Now, the short tariff route shown by the complainant would be 375 miles, or 63 miles greater than through St. Joseph, and the rate would be exactly the same.

At the next station the rate through St. Joseph is 28½ cents.

Exam. Stiles: That is Shannon City?

A. That is Shannon City. But although the short-cut route shown by the complainant is 94 miles longer, the complainant would enjoy a rate of 27½ cents, or a cent lower than the lowest going rate over the short route. And that is on the basis, as I say, not of the shortest present tariff [fol. 163] route, but of the short tariff route sought by the complainant. The shortest present route through Omaha is 528 miles.

Now, the last station on this line is Bondurant, Iowa, where the rate on the St. Joseph combination is 32 cents for 400 miles, and in column I the distance shown by the complainant is 410 miles, and the resulting rate is 28½ cents.

Now, these, please bear in mind, are the actual rates for the through service as well as for service transited at market points.

At the bottom of page 4 is a statement of averages. The present distances favor St. Joseph by 124 miles, and on the average the rate favors St. Joseph but 3.9 cents, which is not an unreasonable relationship. For those distances under the Western Trunk Line scale the spread would be 3 cents.

The next part of the exhibit in like manner takes up the route of the Chicago, Rock Island & Pacific Railway from St. Joseph to Minneapolis, another one of the direct through routes. I will not take time to refer to specific examples.

Exhibit No. 43 is a map, a railroad map of Kansas and Nebraska and contiguous states, whereon you will notice are drawn two heavy black lines. The more northerly line begins about Minneapolis and runs south, just avoiding Fort Dodge, Iowa, crosses the Missouri River at about Plattsmouth, and then follows generally the line of the Union Pacific Railroad running westward from Omaha. That line is the boundary of the territory from which the [fol. 164] rates to Kansas City and to Atchison are a combination on Omaha on the basis of 6½ cents over Omaha. That is, all the territory north and west of that boundary.

In like manner, coming up from the south, the other line which runs just somewhat north of St. Joseph and just north of the Central Branch line here involved, in like manner defines the territory from which the rates to Omaha are a combination over Kansas City or Atchison. Now, you will notice this line bends to the south just after leaving Lenora, which is the terminus of the Central Branch, and winds back to the east as far as Hoisington, and then runs southwest. In the territory west of that line in Kansas and in Colorado the rates to Omaha are less than the combination on Kansas City and Atchison, for the reason that the Colorado common-point rate operates to hold down the Omaha rate to a lower basis. The rate from Pueblo and Trinidad to Omaha is the same as it is to Atchison and Kansas City. And under the Fourth Section, those rates are held back well into western Kansas. It is from that section that a witness today said he was able to draw grain from Santa Fe points at less than the combination.

Now, this arrangement here of combinations is partly by direct prescription, and partly as the result of prescription. The Commission has said that from points on and north of the Union Pacific main line which runs west from

Omaha, the rates to Kansas City should be combination over [fol. 165] Omaha. I refer you to page 502 of volume 205, and page 165 of volume 215. That I say is a direct prescription.

Now, by reason of the general prescription that rates through the markets as through rates should be combinations on the market, the territory outlines in northwestern Iowa, southern Minnesota, and southern South Dakota, also come into the combination picture. Now, in like manner, it is our contention for the same reason that these rates here involved, inasmuch as they apply from a line which operates through one of these rate-break points, namely, Atchison, should be on the combination, and it is on the combination. Now, the complainant is trying to take this particular line out of the area. It is somewhat similar to the familiar situation of a complainant picking a nearby point in a large group and making a showing out of it.

Further, with reference to the relationship of these inbound rates, and as indicating that they necessarily depart very substantially from a strict distance basis, I refer to the fact that from points on the so-called South Platte of Nebraska, referring again to the map, exhibit 43,—I mean the points in Nebraska south of the heavy black line,—with the exception of points in the near vicinity of Omaha, the rates to Atchison and Kansas City are 2 cents higher than the rates to Omaha, having been prescribed on that basis at page 391 of volume 205, and the reason given is stated at [fol. 166] page 372 of volume 205. The Commission said: "The rates from Nebraska and Omaha will be considered in connection with the relation of proportional rates from Omaha and Kansas City and St. Louis to which the relation of inbound rates from Nebraska and Omaha to Kansas City is definitely related."

Now, I have pointed out that from northwestern Iowa the rates to Atchison and Kansas City are a combination on Omaha. That basis is not justified by narrow considerations of distance.

Exhibit 44 is a statement of two pages, entitled: "Rates on Grain and Distances from Representative Shipping Points in Northwestern Iowa to Council Bluffs and St. Joseph and Relation to Western Trunk Line Scale."

Now, the points that are set up here bear rates to St.

Joseph and the other lower markets of 6½ cents over Omaha and Council Bluffs, but you will notice that because of this relationship, the average rates to Council Bluffs are 94.1 percent of the scale, while to St. Joseph they are 103.7 percent of the scale. In other words, these rates to St. Joseph could not be justified if distance were the only consideration, and instead of 6½ cents, the spread would be reduced to 3, 4, and 5 cents.

Exhibit 45 is a statement of 6 pages, entitled: "Rates on Grain to Omaha and St. Joseph from Points On and North of the Union Pacific Railroad Main Line with Short Line [fol. 167] Distances and Comparison with the Western Trunk Line Scale."

I have already stated that the Commission prescribed the combination over Omaha as the basis for rates to Atchison, St. Joseph, and Kansas City, from Iowa on and north of the Union Pacific main line out as far as O'Fallons, in the extreme western part of the state.

Now, if distances will not justify the 6½-cent spread, there must be something else. I want to call your attention to the fact that at Gibbon, which is near Kearney, Nebr., on this Union Pacific main line, a line of the Union Pacific drops down to St. Joseph, materially short-cutting the distance by way of Omaha, somewhat in the same way as the Burlington could short-cut the distance from the Central Branch through Atchison; only in the case of the Nebraska rate there is no question of two lines. The Union Pacific has the short-cut line.

Here we have taken every station, beginning with Seymour, right out of Omaha and going to O'Fallons. We divided the line into two parts,—first, the main line east of Gibbon on pages 1 and 2; and then on pages 3 and 4 the main line west of Gibbon. I will ask you to change the heading there. On page 3 it says: "Main Line East of Gibbon." It should be "Main Line West of Gibbon."

Exam. Stiles: The reporter will change the official copy as corrected.

A. No, here again, as shown on page 5, distances clearly [fol. 168] will not support the 6½-cent spread in the rates. The difference on the average in distance as shown on page 5, St. Joseph over Omaha, is 79.7 miles. For that difference and for these total distances, the spread in the Western Trunk Line scale is only 2 cents.

Exhibit No. 46 is a statement of 11 pages, showing rates on grain from Kearney, Nebr., to the eastern markets, with distances.

Now, you will note this is made up in the same way as exhibit No. 41, which shows the through rates and distances from the Central Branch points.

By Exam. Stiles:

Q. Where is Kearney?

A. Pardon?

Q. On what line is Kearney?

A. Kearney is on the main line of the Union Pacific Railroad in Nebraska, just west of Gibbon, where the line drops off as the short-cut route to St. Joseph.

The purpose here is to show that when you take this Union Pacific main line in Nebraska and compare the relation of rates to the lower crossings as against Omaha, and then set that against the Central Branch points with their relation of rates, that you will find a very similar situation. In other words, if Omaha has a case here to cut these rates under the combination on Atchison, then we certainly have a case in a like manner to cut the rates from these Union Pacific points to our markets.

[fol. 169] Q. Well, that wouldn't be a defense here, would it, if you were entitled to something and hadn't filed a complaint?

A. Oh, no, it is not a defense, but it is just a statement I will be right after you when you do it, you see.

Well, what I mean is this. Here is a structure which Commissioner Meyer in the Grain Case referred to as "a system of functionally related rates," and the relation of those rates functionally was far more important than considerations of distance. Now, if we are going to change from these situations and give effect wholly to distance, then we are going to have to look to a good many changes in this rate structure, I think. At any rate, I want to show you the situation.

The first part of this exhibit is to be matched up with what we showed in exhibit 41, from Yuma. Here, for example, from Kearney to Chicago the direct distance is 649 miles. Via Omaha the distance is 57 miles less than the average of distances via the four lower crossings, and the disadvantage of the four lower crossings in the through rate is 6½ cents. Their rate is 37½ cents; Omaha's rate is 31 cents. That spread certainly is not justified by the difference in distance of 57 miles. In the case of Yuma, the corresponding difference in distance was 38 miles.

I will not take time to detail all those. That is the theory of the exhibit.

Exhibit No. 47 is a statement which compares rates from [fol. 170] points in northern Nebraska to Kansas City with rates from points on the Central Branch to Omaha, using like distances. For example, from Yuma to Omaha over the tariff route, 317 miles, the rate is 22½ cents. That is the same rate as we have from Elm Creek, Nebr., to Kansas City for 319 miles. So if the Missouri Pacific Railroad wish to be compensated for the service it performs through Atchison by the use of short tariff routes in determining its rates, then it can be seen that the applicable rates are not any higher than those from Nebraska points to Kansas City.

Exhibit No. 48 is a map which is presented to show another situation which is created by the principles of the Grain Case. The points shown here are on the main line of the Union Pacific Railroad from Omaha west and the branches north, and the comparison here is between Omaha and Sioux City.

I call attention to the fact that the Union Pacific has a line running up to Norfolk, where it connects with the line of the C. St. P. M. & O. Railroad running to Sioux City. Now, all the points shown here are on the Union Pacific and rates to Sioux City which are on the full combination over Omaha, and that includes Warnerville, just south of Norfolk.

Exhibit 49 is a statement of five pages, wherein are shown the rates and distances from the points indicated on the map, exhibit 48.

Exhibit No. 50 is a statement of three pages, showing rates [fol. 171] from other points in Nebraska to Sioux City and to Omaha, showing that distance does not control in that situation, either. On page 3 we set in the rates and distances from points on the Winner branch of the C. & N. W.

Railway. Although the distances to Sioux City are materially less than they are to Omaha, the same rates apply, by direction of the Commission at page 373 of volume 205, and the reason given again is the relationship in the outbound rates, which overcomes the mileage consideration.

I would like to call attention to still another situation. Sioux City is a Missouri River rate point. In the General Grain Case, Sioux City sought the same rate from Colorado points as applied to Kansas City and Omaha. This was denied by the Commission because of the thing that has been referred to here, namely, that the rates to Minneapolis and Duluth were established on a lower basis from Sioux City than from Omaha, therefore it was required that Sioux City in its inbound rates pay as much higher than the rates to Omaha. That is set out at page 373 of volume 205.

Now, Mr. Examiner, I want to add one thing here, and that is that I want to support the remarks of Mr. Real with reference to the importance of maintaining these gathering rates over the routes of the originating lines into the markets that they serve, without requiring them to be short-hauled. If we get into a situation like that, we have no way [fol. 172] of telling how this grain adjustment is going to be disrupted. Important grain-originating lines, like the Santa Fe, the Burlington, and the North Western, do not have any provision for participating with any other line in the rates from the points on their line to the markets they serve, and we don't think the Missouri Pacific should be required here to establish any joint through routes over this route with the Burlington.

Mr. Examiner, that concludes my statement, and I offer in evidence exhibits 31 to 50, inclusive.

Exam. Stiles: Exhibits 31 to 50, inclusive, are received in evidence.

(Interveners' exhibits Nos. 31 thru 50, Witness Scott, were received in evidence.)

Exam. Stiles: We will adjourn until 9:30 o'clock tomorrow morning.

(At 5:25 p. m., April 17, 1946, hearing adjourned to 9:30 a. m., April 18, 1946.)

[fol. 173] Thursday, April 18, 1946.

Met pursuant to adjournment, at 9:30 a. m.

[fol. 174] PROCEEDINGS

Exam. Stiles: Let us come to order, please. Mr. Kuhn, have you any cross-examination of Mr. Scott?

Mr. Kuhn: None whatsoever, sir.

Exam. Stiles: You are excused, Mr. Scott.

(Witness excused.)

N. K. THOMAS was sworn and testified as follows:

Direct examination:

The Witness: My name is N. K. Thomas, secretary and traffic manager of the St. Joseph Grain Exchange, 1404 Corby Building, St. Joseph, Mo. I am a registered practitioner and appearing in this case for the St. Joseph Grain Exchange. That exchange is a voluntary association of grain dealers, flour millers, feed mills, and grain elevators, conducting a grain business at and through St. Joseph, Mo., also the flour and feed business. We are appearing here in opposition to this complaint.

I have been connected with the St. Joseph Grain Exchange since January, 1919, and for the last 13 years as traffic manager and for 26 years as secretary. I have been in numerous ICC grain cases, handling the affairs of the St. Joseph Grain Exchange in connection with grain adjustments.

The St. Joseph Market firms and dealers receive considerable amounts of all kinds of grains from the Central [fol. 175] Branch of the Missouri Pacific, which is the origin line involved in this compa*l*int. Our dealers buy and sell such grain and grain products in competeition with other lower Missouri River markets, and also with the Omaha market.

My testimony and evidence to be offered in this case will be along the following lines:

No. 1. That the rates on the Central Branch to Omaha are not in violation of Sections 1 and 3 of the Interstate Commerce Act.

No. 2. That it is neither necessary nor desirable in the public interest or otherwise warranted under Section 15, paragraphs 3 and 4 of the Act, to grant the complaint demands on the Central Branch to Omaha.

My testimony will run along the following lines:

No. 1. That mileage from origin points to the markets is not controlling in arriving at the gathering rates.

No. 2. That the through rates and mileages to final destinations, broken into factors to and from the markets, show that the through competitive picture of the rates is paramount, and not the factors separately considered.

No. 3. That there is no evidence to justify short-hauling the Missouri Pacific from the Central Branch to Omaha, and that such rates should continue on the Atchison combination.

The general basis of rates to consuming territory from the Central Branch is comprised of flat rates from such [fol. 176] origins to the Missouri River markets, and proportional rates from such markets to points at eventual destination. There is some territory in Kansas and southern Missouri to which overhead rates are published, and as to which destination territory there are no proportional rates from the Missouri River markets.

In very large measure, the rates beyond the markets applying in connection with Central Branch grain are proportional rates and subject to the application of the rate-break rule which requires observance of proportional rates on outbound shipments by giving transit at the markets.

It is our interpretation that a mileage basis for rates in the docket 17000, part 7, was not generally used, at least to the substantial exclusion of other factors. The citations which I will offer will show that to the so-called final markets and consuming destinations, through rates were established on a reasonable basis, and then broken back into factors from origin point to the markets and from markets to the eventual destinations. This resulted in factors both to and from the markets which are not strictly related to distance.

By Exam. Stiles:

Q. Can you give the page reference wherein the Commission said they made the rates that way?

A. Yes, sir. My references to such adjustments are 205 ICC 328, 164 ICC 822, 173 ICC 230, 205 ICC 374.

These references will also include portions which refer [fol. 177] to the working basis of rates being approximately 91 percent of the Western Trunk Line Interior Scale, published at 164 ICC 822.

Q. Now, were the page references which you gave the pages where the statements occur that you rely upon?

A. Yes, sir.

Q. Not merely the beginning of the report?

A. No.

Exam. Stiles: Thank you.

A. Further, the prescribed rates were made with relation to absolute short line distances where distance was considered, rather than any other type of distance, such as a tariff route. This absolute short-line distance basis is referred to in connection with the prescription of the Interior Scale, as the witness Scott pointed out yesterday, in the rehearing and reconsideration of the original Grain Case; that is, in 205 ICC 301, the original rates in ICC volume 164, page 619, were substantially represcribed.

At the present time the St. Joseph market can compete with the Omaha market for grain on the Central Branch, Concordia and west, when destined generally to points north and northeast of the Omaha market, including the northwest portion of Iowa, on a line roughly from Omaha east toward Des Moines, and then northeastward toward Mason City, Iowa, this due to the fact that the inbound flat [fol. 178] rates from the Central Branch to St. Joseph are 6½ cents per 100 pounds lower than the inbound rates from that line to Omaha. On the outbound movement, the proportional rates from St. Joseph to the destination area stated are 6½ cents per 100 pounds higher from St. Joseph than the proportional rates from Omaha. Therefore, at the present time an equalization of St. Joseph versus Omaha exists to this northern territory.

The rate situation since July 1, 1935, is considerably different than before that date, by reason of the imposition of the absolute rate break on the proportional-rate markets on that date. Prior to that date, the grain markets, where transit was provided, could transit on the basis of through rates, regardless of the basis on which such rates might be made. In other words, if rates were made on a basis which did not reflect the market combination, we could still transit on the overhead one-factor rate, regardless of its basis of publication.

At the present time the situation is much more rigid, due to the effects of the rate-break rule.

From the Central Branch, so long as the rates to Omaha are 6½ cents per 100 pounds higher than to St. Joseph, Mo., we can continue to compete on Central Branch grain going into territory north and east of Omaha, as described. If the rates from the Central Branch to Omaha were made anything less than 6½ cents higher than rates from cor- [fol. 179] responding points to St. Joseph, we could not compete with Omaha, even though one-factor rates might apply through St. Joseph. This would be due to the restrictions of the rate-break rule. Therefore, as a matter of continuing competition, it is essential that the 6½-cent difference be maintained as between St. Joseph and Omaha on the inbound rates from the Central Branch. Any inbound difference giving Omaha a figure less than 6½ cents over St. Joseph would place us entirely out of competition in handling Central Branch grain to the north and northeast.

It is our view that the inbound rates to markets are inseparably related to through rates in the grain adjustment in the western District. The following citations are offered in support of the statement that inbound rates are fully associated with through rates to final destinations, and that to preserve the grain adjustment the inbound factor should not be considered separately without due consideration to the effect on competition to final destinations and the effect on the entire grain rate structure.

The citations are, showing the page at which the language will be found:

205 ICC 328, 372, 391; 223 ICC 243; and then 243 ICC 311, 312, 313.

These exhibits should be marked.

(The exhibits referred to were marked as interveners' [fol. 180] exhibits Nos. 51 thru 65, Witness Thomas, for identification.)

The first exhibit, with symbol "I", which has been numbered 51, consists of two pages, and shows the present flat rates on grain and grain products from Missouri Pacific stations from the Central Branch west of Concordia to Atchison and Omaha, also the absolute short-line distances from such origins to Atchison and Omaha. The last column to the right on page 2 of this exhibit shows also the absolute short-line distances from points Concordia and west to Omaha, when figured via Atchison, Kansas. The line following "Average" at the bottom of page 2 shows that the average absolute short-line distance from these 38 Central Branch points to Atchison is 214.6 miles, and the absolute short-line distance over any available track connections to Omaha is 243.5 miles, or a difference of approximately 29 miles in favor of Atchison. The short-line distance via Atchison to Omaha exceeds the short-line distance direct to Omaha by 121.9 miles, or an approximate 50-percent circuity, figured on this average basis of the short-line distance through Atchison compared to short line direct to Omaha.

Exhibit No. 52 is of one page, showing absolute short-line distances from Union Pacific stations, Kearney, Nebr., and west, including Barton, Nebr., to Atchison and Omaha, together with the present rates on grain to those markets. [fol. 181] This showing is offered as an example from which the rate adjustment and mileages and other conditions are similar to the conditions on the Central Branch west of Concordia.

In the right-hand column of rates to Omaha on this exhibit down as far as O'Fallons, the rates are made combination over Omaha to Atchison. Those rates to Atchison also apply to St. Joseph, Leavenworth, and Kansas City. From points Suterland to Barton, the rates to the lower Missouri River markets are slightly less than the basis 6½ cents over Omaha, due to grading rates into an equality of rates from Colorado to Omaha, as well as the lower Missouri River markets.

Using the averages shown on exhibit No. 51 and on 52, I want to point out that from the Kearney line of the Union Pacific to Atchison there is an average of rates of 25.1 cents for 331.3 miles average inbound short-line haul. From the Central Branch to Omaha, the average rate of 24.2 applies presently over Atchison, Kan., which has an absolute short-line distance to Omaha of 365.4 miles. From the Union Pacific stations, Kearney and west to Omaha, there is an average rate of 19.2 cents for an average haul of 269.2 miles, whereas from the Central Branch to Atchison there is an average rate of 17.9 cents for 214.6 miles average.

Exhibit No. 53——

By Exam: Stiles:

Q. Are the intrastate rates on grain in Nebraska the same as the interstate rates?

[fol. 182] A. No, not in all instances, due to the influence of orders of the Nebraska Commission.

Q. On this exhibit these are intrastate shipments?

A. No, these are interstate rates in all instances applicable for shipments moving out of the State of Nebraska.

Exhibit No. 53, of two pages, shows present rates and absolute short-line distances from a considerable number of Nebraska junction points generally lying in South Platte territory to Atchison and Omaha. It will be shown that from four points shown by a double asterisk the distances are less to Atchison than they are to Omaha. In case of the other origins, the short-line distances are less to Omaha by the amount shown in the last column to the right on this exhibit.

The next exhibit, No. 54, compares route mileages from Nebraska points to St. Joseph with route mileages from Central Branch points to Omaha. The comparisons are made on the basis of points having a rate of the same figure to the respective markets. For instance, the top bracket of comparison shows a 22½-cent rate to Omaha by way of the Missouri Pacific for a haul of 305 miles via that railroad. The six points compared with Concordia having rates of 22½ cents to St. Joseph have route mileages to St. Joseph ranging from 255 to 362 miles.

In the last column to the right on this exhibit is shown the ton-mile earnings for the respective rates and mileages. [fol. 183] The other comparisons on this page show comparable mileages, comparable route mileages in connection with equal or virtually equal rates. In other words, the significance of this exhibit is that the rates via the Missouri Pacific from Central Branch to Omaha are on the same relative inbound leval as the rates from Nebraska stations to St. Joseph, are comparable rate figures.

Exhibit No. 55 consists of four pages. This compares the adjustment to Minneapolis on the one hand with the adjustment to Memphis on the other hand. The Kansas City-Atchison-Leavenworth and St. Joseph proportional rate is 6½ cents per 100 poinds higher to Minneapolis than is the proportional rate from Omaha. The Omaha proportional is 6½ cents higher than the lower Missouri River markets to Memphis.

These illustrations in this exhibit represent the maximum inbound and outbound differences which can exist over Omaha on the one hand versus Lower Missouri River on the other, or in the reverse direction.

On page 2 is shown the situation from the Central Branch of the Missouri Pacific via Kansas City and via Omaha to Memphis. This exhibit shows in the third column of figures on the left the absolute short-line distances from the Central Branch to Kansas City. The average figure of 725 at the bottom of the page is the absolute short-line distance from the 38 Central Branch points by way of Kansas City to [fol. 184] Memphis. The average figure of 908 is the absolute short-line distance from Central Branch via Omaha to Memphis, a difference of 183 miles on the average through mileages in favor of the Kansas City route. Due to the fact that the inbound flat rates from Central Branch to Kansas City are 6½ cents less to Omaha and the Omaha proportional to Memphis is 6½ cents per 100 pounds higher than the proportional rate to Kansas City, an advantage from Central Branch points to Memphis via Kansas City amounts to 13 cents per 100 pounds in connection with the mileage advantage of Kansas City of 183 miles.

Page 3 shows the situation from Kearney, Nebr., by way of St. Joseph and by way of Omaha to Minneapolis. This exhibit shows the flat rates from Kearney to both Omaha and St. Joseph, the short-line distances, *the short-line distances*, the proportional rates from those two markets to Minneapolis, and the differences. The resulting through rates of 27 cents from Kearney to Minneapolis by way of Omaha for an absolute shortline distance of 527.6 miles, as compared to a rate of 40 cents by way of St. Joseph from Kearney to Minneapolis is 684.8 miles. St. Joseph is therefore at a rate disadvantage as compared to Omaha of 13 cents per 100 pounds, Omaha having a short-line mileage advantage of 157.2 miles.

I wish to compare the showing on page 2 with page 3, to show that the rate and mileage disadvantages are a virtual stand-off—that is, that the Omaha advantage in the [fol. 185] case of Minneapolis is highly comparable to the Kansas City advantage when Memphis is used as a destination.

On page 4 I have shown the rates by way of St. Joseph and Omaha, also the absolute short-line distances from Central Branch points using Minneapolis as a destination. This shows that at virtually equal rates there is a mileage advantage in favor of Omaha of 69 miles from the Central Branch.

Exhibit No. 56 is of one page, and shows rates and mileages pertaining to Concordia, Kan., and Kearney, Nebr., to St. Louis, Mo.. This exhibit was prepared to show Concordia as representative of the Central Branch and Kearney as representative of Union Pacific-Kearney and west. Inasmuch as the origins beyond must move through either Concordia or Kearney, these two points are adequate to reflect the situation beyond them.

At 205 ICC 391, the Commission very plainly stated that the South Platte, Nebr., adjustment was based on a focal destination of St. Louis, Mo. In other words, that the relation of the inbound rates to Omaha and the lower Missouri River markets was made with definite relation to the outbound proportionals from those markets to St. Louis. In the reconsideration of the Grain Case, 205 ICC 301, the rates from South Platte, Nebr., to St. Louis were equalized through Omaha and through the lower Missouri River markets.

Exhibit 56 shows that there is a flat rate from Concordia [fol. 186] to Kansas City of 16 cents, plus a 12-cent proportional from Kansas City to St. Louis, resulting in 28-cent through rate for an absolute short-line distance of 464.6 miles.

From Concordia by way of Omaha to St. Louis, using the Missouri Pacific flat rate to Omaha of 22½ cents, plus 14-cent proportional to St. Louis, there is a resulting through charge of 36½ cents for an absolute short-line distance of 600.4 miles by way of Omaha.

Thus the rate through Kansas from Concordia to St. Louis is 8½-cents less than the rate through Omaha, whereas the short-line distance through Kansas City is 135.8 miles less than the absolute short-line distance via Omaha.

Now, taking Kearney, Nebr., as an example, the flat rate from Kearney to Omaha is 15 cents, the proportional from Omaha to St. Louis is 14 cents, or a total through charge of 29 cents for a short-line distance of 599.3 miles. The rate from Kearney to Kansas City is 21½ cents, the proportional to St. Louis 12 cents; total through rate, 33½ cents for 567.3 miles.

Thus it will be seen in the case of Kearney that the rate from Kearney via Kansas City to St. Louis is 4½ cents per 100 pounds higher than the rate from Kearney via Omaha to St. Louis, notwithstanding the fact that the absolute short line distance through Kansas City is 32 miles less than it is via Omaha.

[fol. 187] The significance of this exhibit, aside from portraying the use of St. Louis as a focal destination, is to show that mileages in these particular adjustments have been given relatively small consideration in setting the rates.

Exhibit No. 57 consists of two pages, and shows inbound flat rates from South Platte and other Nebraska points to St. Joseph and to Omaha, also the absolute short-line distances. This exhibit is drawn up along the same lines as exhibit No. 53, which compared rates and distances to Atchison and Omaha.

The Nebraska origins in the left-hand column of exhibit 57 show some of the towns in capitals. These particular towns were what we call "pegged-rate points" in the docket 17000, part 7, rate prescriptions by the Commission.

Q. Is that true of your exhibit 53, where you have some in capitals?

A. No, it isn't. Those are marked by an asterisk.

By Mr. Scott:

Q. They are also called "key points," aren't they?

A. Yes, sir. These capitalized points are also called "key points" by the Commission in discussing the 17000, part 7, rates and general adjustment.

On page 1 of exhibit 57, Fairmount, Nebr., is also a pegged or key-rate point.

Exhibit 58 consists of two pages, showing proportional rates from Omaha and St. Joseph to ten eastern destina- [fol. 188] tions, including the gateways to the east of St. Louis, Peoria, and Chicago. The absolute short-line distances are also shown from St. Joseph and Omaha to those respective destinations.

It will be noted in connection with the rates that the proportional rates from Omaha and St. Joseph to these destinations are the same in all cases, except to St. Louis, Mo., to which point the proportional rate from St. Joseph is 12 cents, and from Omaha is 14 cents. I call particular attention to the line "Average," following Baltimore, which shows an average short-line distance from St. Joseph to the ten points of 672.1 miles, compared to the distance from Omaha of 740.5 miles.

At the bottom of the page is shown "Average 68.4," which represents the amount by which the short-line distances from St. Joseph to these ten eastern gateways and destinations is less than the short-line mileages from Omaha. These figures are the basis for exhibits which will follow.

Next is exhibit No. 59, which consists of 13 pages. The purpose of this exhibit is to demonstrate that the inbound mileages to Omaha and St. Joseph and the lower Missouri River markets were not the basis for inbound rate relationships to those markets from Kansas and Nebraska. At the bottom of page 1 of this exhibit are shown explanations or symbols which will appear on ensuing pages.

Page 2 represents or shows the through combination rates [fol. 189] from Nebraska origins, and also the absolute short-line distances via St. Joseph and via Omaha to St. Louis, Mo. In the last column to the right is shown the differences between the through distances via St. Joseph and via Omaha, all of these distances being less by way of St. Joseph than by way of Omaha. In the third column of figures from the left on this exhibit is shown the amount by which the rate from points of origin is less to Omaha than it is to St. Joseph. That is true except as to Concordia, Kan., shown at the bottom of the page, in which case the rate is 6½ cents less to St. Joseph than it is to Omaha.

I desire to point out especially that from the five stations near the bottom of page 2, namely, Grand Island, Kearney, North Platte, Ravenna, and Alliance, the short-line distance via St. Joseph to St. Louis is from 19 to 31 miles less than it is via Omaha, whereas Omaha has a rate advantage of 4½ cents per 100 pounds from those five points to St. Louis as compared to the rates applicable via St. Joseph. This is due to the fact that the inbound rates from these points to Omaha is 6½ cents per 100 pounds less than to St. Joseph, whereas the proportional from Omaha to St. Louis is 2 cents higher than the proportional from St. Joseph to St. Louis.

Figuring Concordia, Kan., to St. Louis, by way of St. Joseph and Omaha, there is a 6½-cent advantage in favor of St. Joseph in the rate, and 123 miles advantage in favor [fol. 190] of St. Joseph in the absolute short-line mileage.

The Nebraska origins shown in capitals on page 2 and ensuing pages of this exhibit represent key-point rates as recognized and prescribed by the Commission in the Grain Case.

The remaining pages of this exhibit to and including page 11 deal with similar situations to the destinations shown on page 1 of exhibit No. 58.

By Exam. Stiles:

Q. Where is the explanation of reference marks "Z" and "X"?

A. On page 1, Mr. Examiner. I mentioned that.

I wish to point out that to Peoria, Ill., Omaha has a 6½-cent rate advantage from points Grand Island, Kearney, North Platte, Ravenna, and Alliance, for a mileage advantage of 29 to 41 miles; whereas St. Joseph has a rate advantage of 6½ cents from Concordia to Peoria for a St. Joseph mileage advantage of 63 miles. Similar comparisons can be drawn concerning these points at the bottom of pages 4 to 11, inclusive.

Turning to page 12, I have constructed an average through showing to these ten destinations based on the average short-line mileage from St. Joseph and from Omaha on the figures shown on page 1 of exhibit No. 58 as mileage factors beyond the two stated markets.

With respect to points having equal rates to Omaha and to St. Joseph, namely, Falls City and Salem, as shown at the top of page No. 12, the absolute short-line distance is [fol. 191] less via St. Joseph to these ten eastern destinations and gateways than is the mileage through Omaha. From Table Rock and Venango, points with 1-cent-per-100-pounds lower rates to Omaha than to St. Joseph, and therefore 1-cent-per-100-pounds lower through rates to the eastern destinations, except to St. Louis, than via St. Joseph, the mileage favors St. Joseph by 48½ miles. From the large and controlling South Platte territory in the next block of towns, Omaha has 2 cents per 100 pounds lower inbound rate than does St. Joseph, and except to St. Louis, Omaha has the same 2-cent-per-100-pounds advantage to final destination, due to the fact that the outbound proportional rates are the same from Omaha as from St. Joseph. This notwithstanding the fact that the short-line distances via St. Joseph are 19½ miles less through to final destinations from these South Platte points than are the mileages through Omaha. In other words, while we have a mileage advantage, we are at a 2-cent disability with regard to being equalized on the through rates.

The next block of 3 points, starting with Crete, shows an Omaha inbound advantage of 3 cents per 100 pounds, with an Omaha inbound mileage advantage of 9.7 miles.

Similar comparisons can be drawn from the 4½-cent and 5-cent lesser-rated groups to Omaha on page No. 13 of this exhibit.

I wish to call particular attention to the situation from [fol. 192] the five points starting with Grand Island, having rates 6½ cents less to Omaha than to St. Joseph, and having an average distance to the 10 eastern destinations of 19.4 miles less by way of Omaha than by way of St. Joseph. In other words, for 19.4 miles through distance advantage, Omaha has 6½ cents advantage in through rates from these points in the territory carrying similar rate and mileage relationships.

I want to contrast that situation with six representative points taken from the Central Branch having rates 6½ cents per 100 pounds less to St. Joseph than to Omaha, and with the absolute short-line distance 80 miles less by way of St. Joseph than by way of Omaha to the ten destinations.

By Mr. Scott:

Q. In that block of figures you have just referred to in the third column, the 6½ cents, that should read "Less to St. Joseph," should it not?

A. Yes.

Q. The heading at the top of the page does not apply to that?

A. The rates of 6½ cents per hundred pounds opposite stations Concordia to Lenora, inclusive, represent lower rates to St. Joseph than to Omaha.

Exam. Stiles: The reporter will make the correction indicated on the exhibit.

A. Exhibit No. 60 shows the elevator capacities at St. Joseph, Mo., also the milling and processing capacities.

Exhibit No. 61 shows the flour and milling capacities in [fol. 193] terms of barrels per 24-hour day, also the grain storage capacity of flour mills and the total grain storage of market and milling points as shown.

This shows that at Omaha the flour milling capacity is 5,160 barrels per day, whereas at St. Joseph, Atchison, Leavenworth, Independence, Mo., and Kansas City, as constituting the lower Missouri River markets, the flour milling capacity is 43,774 barrels per day. The total grain storage capacity of Omaha reported is 28,185,000 bushels;

the lower Missouri River markets, including Independence, Mo., 74,739,000 bushels.

Exhibit No. 62 consists of six pages, dealing with the receipts, shipments, and indicated disappearance of grain at St. Joseph, Kansas City, and Omaha.

Exam Stiles: Just what is embraced in that "indicated disappearance!"?

A. Let me explain that later, Mr. Examiner. Will it be all right to explain it when I come to it?

Exam. Stiles: All right.

A. On page 2 is shown the receipts and shipments of wheat at St. Joseph for 1936, the shipments from St. Joseph in 1936, all in bushels, and the difference between receipts and shipments. The figures for the 10 years are similarly listed, and an average taken showing the average annual receipts, shipments, and difference. Similar treatment is given to figures for Kansas City and Omaha.

[fol. 194] Pages 2, 4, and 5 include similar comparisons on corn, oats, and then what is described as "All Grain," which means grains of every kind reported received and shipped out of the respective markets.

Turning to page 6 of this exhibit, I have taken the total receipts of wheat, corn, oats, and all grain at St. Joseph, Kansas City, and Omaha for a 10-eyar period, 1936 to 1945, inclusive, the basic information for which is shown on pages 2, 3, 4, and 5; and I have also taken the reported elevator stocks of wheat at St. Joseph,—for instance, on January 1, 1946, of 1,229,500 bushels. For the 10-year period 1936 to 1945, St. Joseph received 124,800,240 bushels of wheat. This makes a total of slightly over 126,000,000 bushels of stocks on hand, plus receipts.

In the next block of figures, I have taken the shipments for the 10 years, the stocks on hand in the course of the 10-year period, making a total of 86,723,060 bushels, subtracted that from the receipts plus the starting stocks. That resulting figure has been divided by 10 for the annual average, which is shown, yearly average difference, 3,960,668 bushels.

That represents in this calculation an annual disappearance of wheat at St. Joseph, Mo., for the 10-year period of

3,930,668. And by a similar computation, the Kansas City disappearance annually is arrived at, at a figure of 36,972,-813 bushels.

[fol. 195] Combining St. Joseph and Kansas City annual disappearance of wheat, 40,903,481 bushels. A similar computation for Omaha, 8,645,534 bushels.

The great disparity between St. Joseph and Kansas City on the one hand, compared to Omaha on the other, in corn, is shown, with the yearly disappearance at St. Joseph and Kansas City, 13,627,777 bushels, against 931,949 for Omaha.

The oats disappearance, St. Joseph and Kansas City, 5,233,334 bushels, against 194,158 bushels at Omaha.

The total of all-grain, St. Joseph and Kansas City disappearance, 60,564,218 bushels; Omaha, 10,074,008 bushels.

This exhibit and comparison is offered to give the Commission information on the volume of grain moving to and from the respective markets, and also the indicated disappearance, either through eating or processing the local demand either for consumption or for processing at St. Joseph and Kansas City,—that as contrasted to the consumption of such grains in Omaha.

Mr. Scott: Mr. Thomas, may I ask you a question about this exhibit?

A. Yes, sir.

By Mr. Scott:

Q. On page 6, which you have just been discussing, you show an average yearly disappearance at Kansas City of 36,972,813 bushels. Would that not be approximately the amount of wheat ground by Kansas City mills each year?

[fol. 196] A. In my view, it would approximate the Kansas City grind; yes, sir.

Q. What you mean by a disappearance is——

A. As grain.

Q. (continuing) —simply the difference between grain in and grain out?

A. That is true.

Q. Is that right?

A. That is true.

Q. In the case of oats, at St. Joseph, for example, you show a very large disappearance there, but is that not accounted for by the fact that you have a very large oats industry at St. Joseph?

A. That is true.

Q. Now, that is true, is it not, of all of these grains, that you can account for this so-called disappearance by the amount of grain ground or converted by the industries at the several markets?

A. That is true.

Q. Now, what becomes of the products of those grains?

A. The products are consumed locally in a small percent; and the balance shipped to destinations, both in competition with products produced at such points as Omaha and other competitive milling and processing points.

Q. By and large, you could make the general statement, [fol. 197] couldn't you, that this so-called disappearance is about the amount of grain taken in and converted by the industries at the several markets?

A. Yes.

Q. All right.

A. One of the main purposes of the exhibit was to show the industrial usage of grains, and processing for consumption, both locally and beyond, at the respective markets; and further, to show the importance of St. Joseph and Kansas City to producers and shippers of grain as a processing market, as well as the merchandising of grain as grain.

Exhibit 63 consists of seven pages. One purpose of this exhibit is to show the production of various grains in the nine north central Kansas counties traversed by the Missouri Pacific, also other Kansas counties in the northwestern part of the state having equal rates to Omaha and the lower Missouri River markets, namely, the Overland and St. Francis branches in connection with the C. B. & Q., and certain counties in connection with the Rock Island; also to show production of grains in such states as Colorado, Wyoming, and Nebraska, the amount of grain consumed or disappearing in Omaha, either through processing or consumption, and the relationship of the supply available to Omaha at equal or less rates to Omaha as compared to the processing needs.

Exhibit 63, however, is further intended to show that the [fol. 198] counties traversed by the Central Branch in Kansas have considerable grain already in competition in the Omaha market, and that even at equal rates to Omaha, these Central Branch counties would find very substantial quantities of grain already available to Omaha users at equal or lesser rates.

Page 2 of exhibit No. 63 shows, in section 1, the reported production of wheat, corn, and oats for the nine counties traversed by the Missouri Pacific Railroad, Concordia and west, in 1941. In that year these nine counties produced 16,803,000 bushels of wheat. In that same year, the five counties lying west of the nine counties produced 10,569,000 bushels of wheat, and from those five counties the rates to Omaha are generally the same as to the lower Missouri River markets. Also, in 1941 the wheat production in Colorado was 25,036,000 bushels, and in Wyoming 4,648,000 bushels. From Colorado and Wyoming the rates on grain are no higher to Omaha than to the lower Missouri River markets.

Combining block (2) and block (3), representing the producing area having rates no higher to Omaha than the lower Missouri River markets, it will be seen opposite (4) that wheat production in that territory amounted to 40,253,000 bushels. Opposite (6) is shown the Nebraska wheat production in 1941, at 36,194,000 bushels. Opposite (8) at the bottom of the page is shown the figure of 76,447,000 bushels, which represents the wheat production in blocks (2) and [fol. 199] (3), plus Nebraska production in (6), or a wheat production from which territory Omaha has equal or lower rates as compared to rates to the lower Missouri River markets.

In connection with the Nebraska production, the rates from the South Platte territory to Omaha are almost entirely 2 cents lower to Omaha than to the lower Missouri River, and from territory on and north of the Union Pacific to Grand Island and Kearney the rates to Omaha are 6½ cents per hundred pounds lower to Omaha than the lower Missouri River markets.

Similar comparisons are shown for corn and oats for 1941, and on the ensuing pages 3, 4, 5, and 6 are shown production figures and similar comparisons for years up to 1945, inclusive.

On page 7 is shown available sorghum grain production figures, 1945 official records not yet being available. In the lower half of page 7 I have shown also the sorghum grain production in bushels in Kansas, Colorado, and Nebraska. Kansas has a sorghum grain production in connection with the figures of 16,632,000 bushels for 1945. I have also shown at the bottom of page 7 the difference between receipts and shipments of sorghum grains at Omaha.

I wish to return to page No. 2 for a further statement regarding the production of wheat and the amounts available to Omaha at equal or lower rates, and point out opposite (7) the Omaha disappearance of wheat by processing [fol. 200] or consumption in 1941 was 7,106,866 bushels, compared to a total available supply from the origin areas as described of approximately 76½ million bushels. The purpose of this comparison is to show that in so far as grain that is actually produced or consumed in Omaha, the supply is far in excess of the local disappearance or consumption or processing.

Exhibit No. 64 consists of three pages. Now, this exhibit shows the number of carlots of wheat, corn, oats, and other grain originated at Missouri Pacific stations, Concordia and west, for the years 1941 to 1945, inclusive, by years. The total figure in connection with wheat shows 3,812 cars shipped from the nine counties traversed by the Missouri Pacific in 1941. Now, using that 3,812 cars for 1941, on page 2 I have converted that to bushels, using a conversion figure of 1,800 bushels per car. Similar conversions have been made on the bases shown for other grains. I have used a figure of 1,750 bushels for other grains, which is a reasonable and practical figure, as far as grains such as rye, parley, and sorghum grains are concerned.

This conversion shows that in 1941 the Missouri Pacific originated 6,861,600 bushels of wheat at its stations in the nine counties shown on page 1 of exhibit 64.

Turning to page 3, I have set forth the production of wheat and other grains in these nine Kansas counties for the years 1941 to 1945, inclusive, and then on the next [fol. 201] line shown the bushels represented by Missouri Pacific shipments from those counties for the respective years. Then the third line, "Shipments—%," shows the percentage which the Missouri Pacific shipments represent of the total wheat reported produced in the group of nine counties. For instance; in 1941 the Missouri Pacific hauled out of those nine counties wheat amounting to 41 percent of the reported wheat production of those counties for that year. In 1942, the figure was 29 percent. In 1943, it was 54 percent. In 1944, it was 49 percent. In 1945, it was 44 percent.

In connection with corn—

By Exam. Stiles:

Q. Why do you think there was such a great variation there?

A. Between what?

Q. In the years,—29 percent in 1942, and it jumps to 54 percent in 1943.

A. Well, I wouldn't know. Those are the reported figures.

Mr. Ware: A variation in your production would account for some of it.

Mr. Kuhn: Where there is greater production there is a lesser percentage.

A. I wouldn't know how to account for that difference in the figures, Mr. Examiner. I have no information as to conditions which influenced the volume.

With respect to corn, it will be noted that the shipments [fol. 202] via Missouri Pacific are very negligible as compared to the total production, this due to the consumption on farms of the great bulk of the corn produced in that territory. In 1946, however, it will be noted that the percentage jumped to 26, which reflects the very urgent demand for corn for feeding in other areas, and as due to the greater sales by producers, and consequent shipments.

By Exam. Stiles:

Q. There where the production increased, the Missouri Pacific shipments percentage increased, while on the wheat when the production increased the Missouri Pacific percentage of shipments decreased?

A. I see no way of accounting for what tendency the producers might have to hold their grain.

In connection with oats, it will be seen that the shipments are extremely negligible as to movement out of that territory by rail.

Under the heading "Miscellaneous" I have compared the shipments of other grains, which includes rye, barley, and sorghum grains, as compared to sorghum grain production. We had no separated figures as to shipments of sorghum grains, and it was therefore impossible to draw a close analogy between production and shipments in that case. The figure representing "Other Grains," however, in giving credit to sorghum grains for possible shipments of rye and barley, if revised to show only sorghum grains, would tend to cut the percentages as shown.

* * *

[fol. 283] By Mr. Scott:

Q. Mr. Thomas, going back to that wheat production in 1942, where the percentage was low, was there not a large amount of grain put under the loan on farms in that year, and carried over to the next year?

A. I don't recall exactly, but I do know that due to the loan program 2 or 3 years back the farmers were far more ready to accept the loan, the government loan on wheat, than they have been in the last 2 or 3 years, due to the fact that the more recent prices have been in excess of the loan value, and therefore they sell the wheat at ceiling prices, which are above the loan values, rather than place it in the loan at a lower figure and take the risk of storage and a possible risk of decline in the market price.

Q. And also it was a fact, was it not, that a large amount of wheat was fed on the farms for lack of feeding grains?

A. In the past 3 or 4 years there has been a very substantial amount of feeding of wheat on farms, due to the extreme difficulty, if not impossibility, of buying corn and other feeding grains at the ceiling prices which were permitted under OPA regulations. This resulted in the enforced feeding of wheat to livestock on farms to replace the feeding grains.

I want to point out further in connection with exhibit No. 64, that especially in connection with wheat that the high percentage of Missouri Pacific shipments compared to production indicates very clearly that the Missouri Pacific is [fol. 204] having no trouble in getting its share of wheat from these counties against the competition of the Rock Island to the north, which has the same rates to Omaha that they carry to the lower Missouri River markets.

Exhibit No. 65, one page, shows a comparison of ton-mile earnings on the present rates to Atchison and Omaha from the Central Branch, based on the absolute short-line distances to Atchison, also by way of Atchison to Omaha. Taking Concordia, Kan., as an example, the ton-mile earnings on the flat rates from Concordia to Atchison is 20.6 mills per ton-mile. The earnings on the present 22½-cent rate from Concordia via Missouri Pacific to Omaha is 14.8 mills per ton-mile. In the event that the Missouri Pacific, on its own volition or otherwise, would be in a position of having to or desiring to carry the Atchison rate to Omaha, ton-mile earnings of only 10.4 mills would result from applying 16 cents from Concordia by way of Atchison to Omaha.

At the bottom of the page is shown the average ton-mile earnings from these 38 origins to Atchison of 17 mills to Omaha: On the present rates required by the Missouri Pacific, 13.4 mills to Omaha; on a rate from Central Branch to Omaha equivalent to the rate from Central Branch to Atchison, an average ton-mile earning of 9.8 mills, or very little more than half of the ton-mile earnings from origins to Atchison, which rates are in response to the Kansas group [fol. 205] rates prescribed to the Missouri River in docket 17000, part 7.

Another situation I want to make some statement about is that to destinations in southeastern Nebraska, generally north of Endicott, Fairbury, up through Crete, and on up above Lincoln and into Omaha, and in that segment of southeastern Nebraska embraced in that boundary, is what is known as an Omaha rate group. Rates to the destinations in that group from points in Kansas and southern Missouri and some rates from Oklahoma are 6½ cents higher per 100 pounds than from the respective origins to Kansas City, Mo., which, incidentally, is also the rate from those origins to Omaha. That is, the 6½ cents over Kansas City is the Omaha rate. Now, this results in the Omaha rate being applied to southeastern Nebraska, and the adjustment is referred to as the Omaha group. Rates are carried into this territory on a basis of 6½ cents per hundred pounds higher than the rates to Kansas City from lines that follow their ICC tariff rules,—S. L. & S. F. ICC 11298, M-K-T 1434, Missouri Pacific A-9821 and A-9719, A. T. & S. F. 14137.

In the event that the Missouri Pacific felt impelled to carry reduced rates to Omaha by its own line via Atchison, the effect on the Fourth Section would be to break down the Atchison rates in this Omaha group and southeast Nebraska. The balances beyond Atchison from Central Branch points would be nothing into southeast Nebraska, whereas the [fol. 206] balances beyond Atchison from points on the Frisco, M-K-T, A. T. & S. F., and Missouri Pacific origins south of the Central Branch would all be 6½ cents beyond Atchison.

From stations on the Rock Island west of Belleville the rates to Omaha do not apply generally to this Omaha group, although they do apply to Rock Island points intermediate to Omaha as maximum rates to intermediate points. In other words, the Rock Island does not carry rates to this Omaha group, whereas Central Branch rates do carry the 6½-cent basis to points widely scattered through this Omaha group.

As an example of the disruption which will be caused by breaking down rates to Omaha, the present rate from Concordia, Kan., to Osborne, Nebr., is 22½ cents. If a rate of 16 cents were maintained from Concordia to Omaha via Missouri Pacific, it would result in a rate of not to exceed 16 cents Concordia to Osborne. The effect also would be to break down rates from intermediate origins to Omaha. At the present time the rate from Frankfort, Kan., to Omaha is 20½ cents. If the Missouri Pacific carried 16 cents Concordia to Omaha through Frankfort, it would mean breaking down the Frankfort rate to not to exceed 16 cents.

A further breakdown would result in rates from points east of Concordia to destinations intermediate on the Missouri Pacific from Atchison to Omaha.

This concludes what I have to offer on direct examination, [fol. 207] and I offer exhibits Nos. 51 to 65, inclusive.

Exam. Stiles: Exhibits 51 to 65, inclusive, are received in evidence.

(Interveners' exhibits Nos. 51 thru 65, Witness Thomas, were received in evidence.)

By Mr. Scott:

Q. Mr. Thomas, I would like to ask you a question, please. In connection with exhibit No. 52, you showed a rate of 27 cents from points on the Union Pacific line in western Nebraska to the lower Missouri River markets. What is that rate?

A. That is the Colorado common-point rate held as a maximum at intermediate Nebraska points.

Q. That same rate applies to Omaha as well as to the lower markets, does it not?

A. It does from Colorado.

Q. And from points in southern Colorado such as Pueblo and Trinidad, what are the rates?

A. The rates are equal to Omaha, compared with the rates to Kansas City. I forget the exact figure.

Q. Isn't 27 cents the Colorado common-point rate?

A. It is my recollection that it is.

Mr. Scott: Thank you.

Exam. Stiles: Cross-examine.

Cross-examination.

By Mr. Kuhn:

Q. Mr. Thomas, I have no intention of taking up the time [fol. 208] of the Commission by analyzing your exhibits, but I note in your exhibit 62, elevator stock, St. Joseph and Kansas City, over a billion bushels; at Omaha, 244 million. Is that of any significance in this case? Would you say that Omaha is getting more than its share of the grain produced in this part of the country?

A. I believe you have misread the figures.

Q. Well, you show St. Joseph 124 million, Kansas City 939 million, Omaha 244 million.

A. Those are receipts of wheat over a 10-year period, Mr. Kuhn.

Q. Well, I don't care what the period is; it shows the difference, or the tremendous amount of wheat received, whether it is for 1 year or 10 years, at Kansas City-St. Joe versus Omaha. All right, we will pass that. Now, the rates from St. Joseph and Atchison are the same as from Kansas City to all of the destinations beginning at St. Louis, the southeast and the south, with possibly a short distance from Kansas City, are they not?

A. That is correct.

Q. And your distance from St. Joseph to Kansas City by the Burlington Railroad is 65 miles?

A. 62.4.

Q. 62.4. We will be exact about it. You don't pay anything for that additional distance, do you?

[fol. 209] A. Sometimes.

Q. How?

A. The balance in the rate.

Q. Do you have transit?

A. Yes, sir.

Q. Oh. It is very rare instances, though, isn't it?

A. It is what we call a nearby territory which has a lesser rate to St. Joseph than to Kansas City.

Q. Well, now, in your rate exhibits—I am not going to analyze them, but I have gone through them in a cursory sort of a way, and you show there generally, it seems to me that the rates paid by the Omaha market as against Kansas City to St. Joe are either equal or in favor of Omaha; is that the intention of these exhibits?

A. The rates are taken from the tariffs and the proper reference, and they speak for themselves. I don't mean to misrepresent any market or any rate.

Q. I am not accusing you of misrepresenting anything; I am asking you what the intent of the exhibit was. Is it to show that Omaha is even on a better basis than Kansas City and St. Joseph in any case?

A. Yes, that is true from southwest Nebraska and from north Omaha territory in Nebraska, the north Omaha adjustment offsetting the Central Branch and south adjustment from Kansas.

Q. You didn't hand-pick the producing territory here [fol. 210] particularly, did you?

A. No, I didn't intend to.

Q. Are you familiar with what is known as the Panhandle territory in western Nebraska, which produces tremendous amounts of high-protein wheat? That is west, the west end going toward the Colorado line.

A. I know a little about it.

Q. Yes. You have been in several cases involving it?

A. That is right.

Q. Now, I am just wondering why that territory was omitted from your exhibits when you were making these comparisons of the rates to Omaha based on distance versus Kansas City. That is the reason I asked you if the points were hand-picked.

A. No, they were not. They were omitted because the mileage situation beyond Kearney is the same whether it be in this Panhandle area or not. They all move through Kearney going to the east.

Mr. Kuhn: All right. For the benefit of the Examiner, who is of course not familiar with this territory, I want to say that the rate from Sidney, Nebr., on the Union Pacific, which is in this Panhandle country, is 27 cents per hundred pounds to Omaha for a distance——

Exam. Stiles: Now, just a moment. Are you laying the premise for some question to this witness, or do you want to put something in the record for evidence? If you do, [fol. 211] just wait until you are through cross-examination and go on the stand and put it in as part of your rebuttal.

Mr. Kuhn: All right, I will put it in as rebuttal. That is all.

The Witness: Mr. Examiner, could I make a further statement in that respect to add to my direct testimony?

Exam. Stiles: Yes.

Redirect examination:

The Witness: In docket 17000 the Commission prescribed equal rates from Colorado to Omaha on the one hand, and the lower Missouri River markets on the other. In setting in those rates, the carriers were compelled to grade into an equality of rates at the Colorado line, the line of the Union Pacific west from Kearney to Barton, Nebr., down to Julesburg in Colorado, then up in Colorado again up towards Sidney and Kimball, Nebr., and then entering Wyoming. Read that.

(Record read by the reporter.)

In other words, the adjustment from Julesburg, Colo., and west back to a small segment of the Union Pacific through Nebraska is made with relation to the Colorado adjustment, and not the South Platte or the North Omaha adjustment prescribed in the Grain Case. The rates from this territory were further treated by the Commission in docket 28395 and 28417.

Do you want an ICC reference on that or not? Do you care for it?

[fol. 212] Exam. Stiles: If you have it.

A. The ICC reference being volume 243, approximately page 311.

Mr. Ware: Can you give the 17000, part 7, citation too?

A. I referred to it as the Grain Case. It has been in the record here numerous times heretofore.

Mr. Ware: There are so many of those volumes I thought you could bring it down to one.

Mr. Scott: That is not the Grain Case.

A. This one is, this 28395. That is the reason I gave the citation on that.

Mr. Ware: Thank you.

Exam. Stiles: Is that all?

The Witness: That is all.

Exam. Stiles: You are excused.

(Witness excused.)

Exam. Stiles: I understand that is all the interveners that wish to be heard.

We will take a short recess at this time.

(A short recess was thereupon taken.)

Exam. Stiles: Come to order, please.

JOHN A. KUHN, recalled, testified further as follows:

Direct examination:

The Witness: The representative of the Topeka Chamber of Commerce, Mr. Real, I guess, testified that if the route [fol. 213] via Concordia is to be provided, that would be an opening wedge for many, many similar routes throughout this territory, and Mr. Scott supports him in that statement. In the instant case, the Concordia route is requested because the defendant claims his own route is unreasonably long, and he therefore must provide his discriminatory rate of 6½ cents higher to Omaha than to Kansas City.

Mr. Ware: I challenge that as an unfair statement.

The Witness: The testimony will speak for itself.

Now, then, if the gentlemen from Topeka and Kansas City have any similar situations, where an exhorbitant rate is charged because of an unreasonably long route as compared with another practicable through route, they have a perfect right to appeal to the Commission to remedy the situation under Section 15 of the Act.

Again, quite an ado is made about the matter of running time from Concordia to Omaha over the Burlington Railroad, one of the first-class railroads of the country, the same as the Missouri Pacific. I checked this up before I filed the complaint, and found the maximum time from Concordia to Omaha was 24 hours, rather than 34 or 36 hours, as here testified.

Mr. Scott: Mr. Examiner, that is hardly rebuttal if he had that information at the beginning.

The Witness: I have since checked up this running time, particularly in view of the fact that the witness the superin- [fol. 214] tendent of the Missouri Pacific stated that he had heard from Burlington employees that the running time from Concordia to Omaha was 36 hours, and I find that the maximum running time is 24 hours.

Exam. Stiles: Do you have the schedules?

The Witness: I can furnish them through the——

Exam. Stiles: Mr. Scott put in some testimony on that in which he showed time via the different routes, as I recall.

The Witness: Yes. Well, I have taken—Take for instance the short route——

Exam. Stiles: Are you contending that his exhibit is in error?

The Witness: Yes, sir; I contend it is in error, his exhibit No. 32. As a matter of fact, Mr. Examiner, I don't think it has much to do with this case. But as I said at the outset; they have made quite an ado over it.

I have been engaged in transportation matters since the inception of the law in 1887, and this is the first instance that has come to my attention where interveners were so insistent that a shipper located as these shippers are located should not be accorded an additional market, Omaha, to dispose of their products on an equality in rates.

Now, a statement was made—I think it was the Missouri Pacific witness—that they had no complaints from the shippers. As a matter of fact, all these shippers are located [fol. 215] on railroad ground. They secure leases at a nominal basis. They have side tracks built and maintained to their plants. They are rather loath to gain the disfavor of the carrier by protesting or coming to the front where somebody else protests, as in this instance the Omaha market. We protest that there is discrimination from this origin territory.

I started to write some letters to some of these people, and then the thought occurred to me that it might be difficult to secure their views, and that thought occurred to me because of the fact that when I was the general freight agent of the North Western lines west of the Missouri River I held a club over the heads of every fellow that had a lease from us.

Mr. Ware: How long ago was that, when you were general agent?

The witness: General freight agent.

Mr. Ware: General freight agent.

The Witness: What was in 1901 to 1906. I will give you my correct age; if you wish it. I am 76 years old.

Now, then, I wrote some letters out there. I just wrote two of them, and then I stopped, waiting to hear from these people. One of them was an elevator man at Glade. I never did receive an answer. The other one was to an elevator man at Lenora, the Lenora Mercantile Association, which is at the end of the line here, Mr. Examiner. I would like to put that letter in the record. I will read it, if you wish.

[fol. 216] Mr. Ware: Mr. Examiner, I don't know what is in that letter. I would like to read it.

The Witness: I will read it.

Mr. Ware: No, I would like to read it.

The Witness: Oh, you would?

Exam. Stiles: Let counsel see it. Suspend the record.

(Discussion off the record.)

Mr. Ware: Mr. Examiner, I having read that letter, am going to object to it. It is not proper evidence. I think we would have a right to cross-examine this man if he is going to make any statement such as he has made in there. They are nothing more than general, nothing different than what we have already heard from the complainant in this case. I don't think it is proper evidence.

Exam. Stiles: The witness may state in a general way that he has communicated with this shipper and may state in a general way what the shipper's attitude is.

Mr. Ware: Mr. Examiner, if he is going to put that letter in, then I would like to have Mr. Kuhn's letter which he wrote to this man soliciting that reply put in evidence.

The Witness: There it is. I will put both of them in the record.

Mr. Ware: If you put in one, put them both in.

Exam. Stiles: I think it is quite a common thing for commerce counsel to state that they communicated with shippers [fol. 217] who urged them to press their complaint. It doesn't seem to me it is anything unusual.

The Witness: I communicated with the Lenora Mercantile Association, R. E. Jacobs, Manager, informing him it was our intention to bring a formal complaint against the Missouri Pacific Railroad to publish the same rates to Omaha as applied to Kansas City, and I received a reply from this gentleman to the effect that it would be of great benefit to his producers by giving them a chance to patronize the Omaha market as well as the Kansas City and St. Joseph market, and thanking me for our consideration in bringing this matter to the fore.

I have another letter which was unsolicited.

Exam. Stiles: Now, before you get any farther away, the party to whom you referred urged a route via Hastings as being a more expeditious route, and you having stated that the running time is less than has been stated by Mr. Scott, I am just wondering if the time you checked on was the route via Hastings rather than the routes which Mr. Scott covered.

The Witness: No. Well, I didn't care to go any farther than I had gone, namely, the route via Concordia, which runs, I believe through Hastings on the Burlington Railroad.

Exam. Stiles: No, it doesn't The route you are asking for doesn't run through Hastings.

The Witness: Well, all right. I might clarify that question, Mr. Examiner. We may suggest the same rates via [fol. 218] Hastings over the "Q" or U. P. We believe this would be a much faster route on account of heavier rail and better trackage.

Exam. Stiles: The question I asked you was whether the times, the running time which you mentioned a little bit ago in your testimony was checked via Hastings or via Concordia and one of the routes Mr. Scott showed.

The Witness: No, I did not check the time via Hastings. Mr. Scott doesn't show the time via Hastings in his exhibit, either.

Exam. Stiles: No, he does not.

The Witness: No, neither one of them, so the matter of time is via Concordia only.

Exam. Stiles: All right. Now go on to your next.

The Witness: Under date of April 2, 1946, I received the following letter, unsolicited, from the firm of Simpson, Romeister & Evans Grain Company:

"Secretary, Omaha Grain Exchange:

"*We are writing you to ascertain what progress is being made in regard to the proposed change of rates whereby the points on the Missouri Pacific Central Branch from Stockton and Lenora down to Atchison would take the same rate to Omaha as to Kansas City.* We are anxious to see this accomplished, and are wondering what progress is being made in regard to it.

"We will appreciate a reply as soon as possible, and thanks very much."

[fol. 219] Their letterhead shows they operate 40 country elevators. I do not know where they are located, but they must be in Kansas, and also along this line; otherwise they wouldn't be interested.

Now, the originals of these I will be very glad to put in the record, if you wish.

Mr. Ware: Where is he located, the writer of that letter?

The Witness: Salina, Kan., 40 country elevators. Incidentally, they are members of the St. Joseph Grain Exchange.

Exam. Stiles: Anything further? Any further testimony, Mr. Kuhn?

The Witness: Yes. With reference to Mr. Thomas's exhibits, he presents a number of exhibits giving rates and mileages to Omaha in comparison with the rates to Kansas City and the mileages. He makes a showing that looks to me, although not having thoroughly analyzed the exhibits, not having had the time—They are from points in Nebraska, but he does not show any of the territory which is known as the Panhandle territory. That is in western Nebraska, and produces the finest quality of protein wheat grown in western Nebraska. Some parts of Colorado are also involved.

I will take Sidney, Nebr., one of the prominent points in the Panhandle, located on the Union Pacific Railroad. The distance to Omaha is 405 miles. The rate is 27 cents per 100 pounds. The distance to Kansas City runs all the [fol. 220] way from 522 miles to 622 miles, rate 27 cents per 100 pounds. I merely mention that because I think Mr. Thomas should have at least included some of the Nebraska territory from which the rates are the same to St. Joseph and Kansas City as they are to Omaha, and the distance much greater to the lower Missouri River markets.

That is all I have, sir.

Exam. Stiles: Any cross-examination?

Cross-examination.

By Mr. Ware:

Q. Mr. Kuhn, what do you mean by "running time"?

A. Freight schedules handling the business.

Q. Is that actually the actual running of the train, is that what you took into consideration?

A. Oh, yes.

Q. Did you take into consideration any delay at any of these points?

A. No, I did not. I asked the Burlington Railroad to inform me what their time was from Concordia to Omaha, and that is the information they gave me, and I didn't find out anything about layovers or anything of that kind.

Q. I see. How many of these letters did you write out to these country elevators soliciting their help?

A. Two; one at Glade and one at Lenora.

Q. You didn't get an answer from the man at Glade?

A. No.

Q. What do you construe from that, the fact that you [fol. 221] didn't get an answer?

A. I am satisfied he was one of these fellows that was afraid the Missouri Pacific would hold a club over his head, the same as I used to hold a club over those along the North Western line who leased their ground from us.

Q. You are judging the actions of the Missouri Pacific by what you used to do when you were working for the railroad back in 1901 to 1906?

A. Not necessarily. I am simply relating that is what can be done by the railroads, and I know that in these cases —or at least I think I know—but common sense tells me that they will say to these people, "Don't." When I say "Don't," I mean, "We don't want these people to receive a favorable answer. Stay away from them."

Q. You base your testimony, then, on what can be done rather than what actually is done?

A. Yes, sir; absolutely. I don't know that you do it.

Mr. Ware: All right. Thank you, sir.

By Mr. Scott:

Q. Mr. Kuhn, are you able to say that exhibit No. 32, which shows the Burlington Railroad freight schedules, is wrong in any respect?

A. Only what I learned from the Burlington Railroad before the case was brought, and again this morning before this hearing reconvened.

Q. Is there any error in this?

[fol. 222] A. Yes.

Q. Where is the error?

A. You show 34 hours, and they say a maximum of 24 hours.

Q. Where is the error in the computation?

A. I don't know where the error it. You show by a computation that the time is 30——What is it?

Q. 34 hours.

A. 34 hours.

Q. And 45 minutes.

A. And 45 minutes. I don't care how you got it. I am telling you what the railroad itself told me.

Q. Did they say how that time that they gave you was figured?

A. I didn't even ask them. I merely said to them, "How long does it take you to handle a carload of grain from Concordia billed through to Omaha?"

Q. And you were satisfied with their statement?

A. Yes, sir. They are the people that operate the railroad.

Q. You didn't take this statement down to them and show them?

A. No.

By Exam. Stiles:

Q. Who furnished you that information?

A. The general manager's office of the Burlington Railroad.

By Mr. Scott:

Q. Why didn't you get him on the stand here?

A. Because—I don't want to be short with you—I think the matter of time as put in here and the valuable time of the Commission as taken up here is puerile,—p-u-e-r-i-l-e (spelling).

[fol. 223] Q. Thank you for explaining that word to me. You don't think it makes any difference, then, how much time it takes over this line?

A. Within reason.

Q. Well, what are the limitations in your mind in that respect?

A. Oh, based on what the carriers through the Association of American Railroads are telling us now by circulars, through the newspapers, public addresses, etc., that their freight trains are almost on a parity with their passenger trains in the matter of running time.

Q. I mean in respect to this particular situation, Mr. Kuhn; if it takes the Burlington 6 hours or 10 hours longer time than the Missouri Pacific would take, that is a matter of no concern to you?

A. None whatever, excepting when the grain is out of condition, such as the corn was last season, and then we notify them to handle it as perishable freight.

Q. Then that route, so far as you are concerned, is preferred only because the distance is shorter, isn't it?

A. Yes, and because of the refusal of the Missouri Pacific to put these people on an even keel with Kansas City.

Q. Now, you didn't ask the Missouri Pacific in this case to reduce its rates to Atchison, did you?

[fol. 224] A. No, no.

Q. Well, now, if you think those rates are wrong, how does it happen you didn't attack them here?

A. Attack what rates?

Q. The Missouri Pacific's own rates from the branch——

A. Oh, because they told me they had already refused to give us relief we asked them for via Atchison, and I could see there was no necessity, because of their distance via Atchison.

Q. You think that was the justification from their standpoint, do you?

A. Well, I wouldn't say it was a justification, no. That is their business.

Q. Well, but you did consider, didn't you, the advisability of bringing a complaint against the Missouri Pacific over its own line, and you rejected that thought, didn't you?

A. No, I didn't consider that; I didn't say I considered that. I asked them, I appealed to them to give me the rates, or give Omaha the rates via their own line, and they denied that, declined to give us any relief, both by letter as well as orally, through Mr.——

Q. Well, you had the right to bring a complaint against them, the Missouri Pacific, as to the rates over their own rails to Omaha, didn't you?

A. Yes.

Q. But you elected not to do that?

[fol. 225] A. Exactly.

Q. Why?

A. Because I had a reasonably short workable route through Concordia and the Burlington Railroad, and Section 15, paragraph 4, protects me in that respect; and when I say "me," I mean the Omaha Grain Exchange.

Q. And so far as the Missouri Pacific's own rate is concerned, you perceive the justification for some increase in the rate in view of the 157 miles of additional service over Atchison, don't you?

A. Over Atchison?

Q. Yes.

A. It isn't 157.

Q. What?

A. It isn't 157 miles over Kansas City.

Q. I say over Atchison.

A. I wouldn't care to answer that question. Atchison is the back yard of Kansas City, according to their own testimony; and so is St. Joe.

Q. You had a letter from a firm of Simpson, Remeister, and Evans?

A. Yes?

Q. Salina, Kan., is their headquarters?

A. Yes.

Q. Do they operate any elevators on the Central Branch?

[fol. 226] A. I haven't the slightest idea. I didn't even look it up. I take it for granted they did, though, or else why should they write me?

Q. They don't have any terminal elevators anywhere?

A. Not that I know of.

Q. And they are not in any Missouri River market in any kind of an operation through terminal elevators?

A. Their letterhead says they are members of the St. Joseph Grain-Exchange.

Q. That doesn't mean they are in business in St. Joseph?

A. Not necessarily; no, sir.

Q. So far as you know, they have no interest in any one market on the Missouri River?

A. No, sir.

Q. And they would just as soon ship to Omaha as anywhere else in the world, wouldn't they, if they got more money for it?

A. If they got more money for it, of course.

Q. Even if they tear up the rate structure, that wouldn't make any difference to them, would it?

A. If they got more money and an equal rate.

Mr. Scott: That is all.

By Mr. Thomas:

Q. I would like to ask you, Mr. Kuhn, do you know the distance of the Union Pacific line where it leaves Colorado, Julesburg through Sidney, the length of that segment?

A. You mean going south to St. Joe?

[fol. 227] Q. No, going from Julesburg to Cheyenne, where it leaves the Colorado-Nebraska line and runs through Nebraska?

A. Yes.

Q. About how long is that, do you know?

A. Oh, you are asking me the distance?

Q. Yes.

A. I don't know the distance.

Q. All right.

A. I know the railroad runs down that way, by way of Julesburg of course?

Q. Would you say it was substantially small compared to the entire Union Pacific mileage in Nebraska?

A. Oh, yes, no question about it; but a tremendously productive territory in so far as protein wheat is concerned.

Q. Is the mileage substantial or small compared to the Union Pacific mileage in Nebraska.

A. Oh, yes, the Union Pacific is the second largest railroad in Nebraska. The Burlington is the first.

Q. I mean, the relationship with this Sidney line compared to the total Union Pacific mileage in Nebraska.

A. Oh, yes, yes, it takes in possibly, oh, 100 miles altogether.

Q. Do you know whether or not there is a line of the Union Pacific from O'Fallons up to Oshkosh in Nebraska?

A. Yes.

Q. And what the rate relationship is from Kansas City [fols. 228-229] and St. Joseph is in that respect?

A. 6½ cents higher than the rate to Omaha.

Mr. Thomas: That is all.

Exam. Stiles: Is that all? You are excused.

(Witness excused.)

Exam. Stiles: Briefs will be due on May 20. All briefs are due on the same date. A proposed report will be served.

The hearing is closed.

(At 11:50 a. m., April 18, 1946, hearing closed.)

[fol. 230] COMPLAINANT'S EXHIBIT No. 1

Omaha Grain Exchange A, I. C. C. Docket No. 29461. Witness John A. Kuhn

Statement of rates and distances on grain and grain products Proposed via Concordia, Kansas and C. B. & Q. R.R. to Omaha, also present rates to Kansas City including distances:

		Distance to Omaha via Corcordia & CB & Q RR Miles	Rate proposed to Omaha Cts per 100 lbs.	Distance direct via MP to KC Miles	Rate to K.C. cts per 100 lbs.
		Superior Branch			
Yuma	Kansas	203	16	208	16
Norway	"	210	17	215	17
Scandia	"	217	17	222	17
Sherdahl	"	222	17	227	17
Republic	"	226	17	232	17
Warwick	"	234	17	237	17
		Lenora Branch			
Jamestown	"	209	17	214	17
Scottsville	"	216	17	221	17
Gilbert	"	222	17	227	17
Beloit	"	227	17	232	17
Solomon Rapids	"	232	17	237	17
Glen Elder	"	239	18	244	18
Downs	"	245	18	250	18
Portis	"	255	18	260	18
Kirwin	"	274	19	279	19
Glade	"	285	19	290	19
Densmore	"	303	19	308	19
Lenora	"	336	19	341	19
		Burr Oak Branch			
Randall	"	219	17	224	17
Jewell	"	226	17	231	17
Mankato	"	235	18	240	18
Burr Oak	"	242	18	247	18
		Stockton Branch			
Osborne	"	255	18	260	18
Bloomington	"	260	18	265	18
Woodston	"	272	18	282	18
Stockton	"	283	19	288	19

Authority: Rates to Kansas City Mo. Pac. tariff No. I.C.C. A-9719 Distances—Official Guide.

[fol. 231] COMPLAINANT'S EXHIBIT No. 2

Omaha Grain Exchange B, I. C. C. Docket No. 29461. Witness John A. Kuhn.

Statement of rates on grain and grain products published by the Missouri Pacific R.R. from Hastings, Nebraska and Superior, Nebraska to Omaha, Nebraska: (These points also served by the C. & N.W. R'y. and C. B. & Q. R.R.)

Routing is provided for delivery of the grain to either the Northwestern or Burlington at the above junctions.

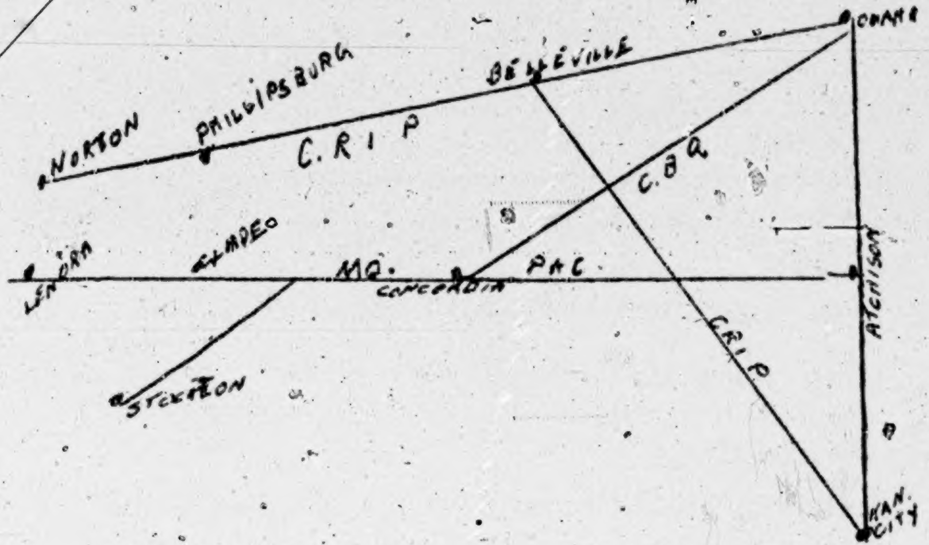
From Hastings To Omaha 15 cents.
From Superior To Omaha 15 cents.

(Rate from Warwick, Kansas (9 miles south of Superior) to Omaha 23½ cents or 6½ cents higher than rate to Kansas City.)

Authority Mo. Pac. tariff I. C. C. No. A-9719.

[fol. 232] COMPLAINANT'S EXHIBIT No. 3

Omaha Grain Exchange C, I. C. C. Docket No. 29461. Witness John A. Kuhn


OMAHA
BELLEVILLE
PHILLIPSBURG
NORTON
C.R.I.P
C.B.Q.
LENORA
GLADE
MO.
PAC
CONCORDIA
STOCKTON
ATCHISON
C.R.I.P
KAN. CITY

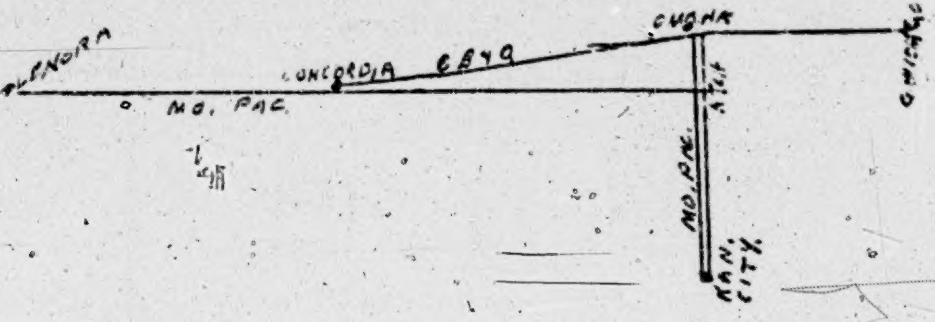
Phillipsburg to Omaha, rate 19 cts. Distance 243 mi.
Phillipsburg to Kan. C. rate 19 cts. Distance 299 mi.

x Glade to Omaha rate ~~19 cts~~. Distance 285 mi.
(Rate requested via Concordia)

Glade to Kansas City—rate 19 cts. Distance 290 mi.
x Present rate Glade to Omaha 25½ cts. via Mo. Pac. direct.

[fol. 233] COMPLAINANT'S EXHIBIT NO. 4

Omaha Grain Exchange D, I. C. C. Docket No. 29461. Witness John A. Kuhn

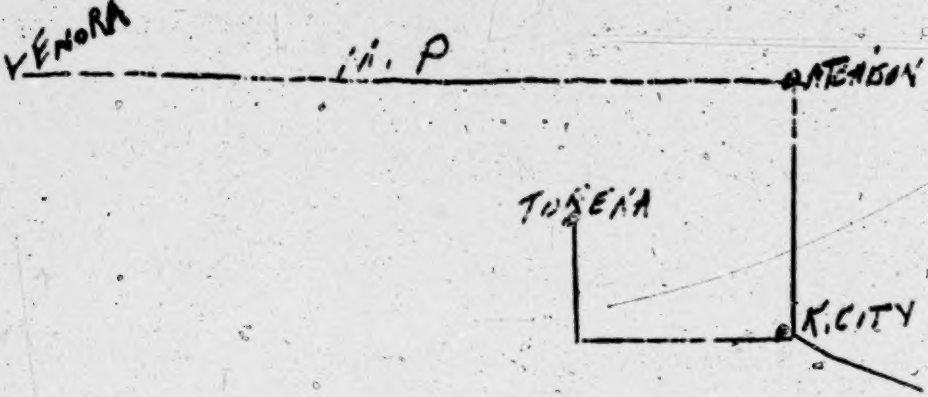


Using Chicago as destination	Distance mi.
Present rate Lenora to Chicago via Kan. City 35 cts.	1041
(Rate made up of 19 cents to Kan. City, plus proportional rate of 16 cents)	
Distance made up of 341 mi. to Kansas City, 200 mi. Kansas City to Omaha, and 500 mi. Omaha to Chicago	
Present rate Lenora to Chicago via Omaha 41½ cts.	.943
Rate made up of 25½ cts. to Omaha, plus proportional rate of 16 cts.	
Distance made up of 443 mi. to Omaha, via Atchison, plus 500 mi. beyond.	
Rate requested via Concordia and Omaha 35 cts. Rate made up of 19 cts. Lenora to Omaha, plus proportional rate of 16 cts. Omaha to Chicago.	836
Distance made up of 336 mi. to Omaha, plus 500 mi. beyond.	

Authority for rates Mo. Pac. I. C. C. No. A-9719
Western Trunk Line I. C. C. No. A-3455,
E. E. Kipp, Agent.

[fol. 234] COMPLAINANT'S EXHIBIT No. 5

Omaha Grain Exchange E, I. C. C. Docket No. 29461. Witness John A. Kuhn



Mo. Pac. tariff I. C. C. No. A-9822, Item 2285, provides FREE TRANSIT at Topeka, Kansas, on shipments from Lenora, destined to points in Arkansas, also Memphis, Tenn., distance Lenora to Kansas City 341 mi., Kansas City to Topeka 133 miles, round trip 266 mile miles, total 606 miles —rate 19 cents. (Short route is back through Kansas City).

[fols. 235-236] COMPLAINANT'S EXHIBIT No. 6

Omaha Grain Exchange F, I. C. C. Docket No. 29461. Witness John A. Kuhn

Missouri Pacific Lines application bearing Western Trunk Line file 29135, February 14th, 1946, requesting authority to publish GOING proportional rate of 16 cents per 100 lbs. from Council Bluffs, Omaha and South Omaha to Chicago via Kansas City, St. Louis and C. & E. I. R.R., with transit at St. Louis, granted April 6th, 1946:

Distance	
Omaha to Kansas City	200 mi.
Kan. City to St. Louis	279 mi.
St. Louis to Chicago	290 mi.
Total	769 mi.

Short tariff route Omaha to Chicago 488 miles.

[fol. 1] IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action. No. 7769(1)

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

COMPLAINT—Filed February 12, 1951

To the Honorable Judges of the United States District Court for the Eastern District of Missouri, Eastern Division:

Now comes plaintiff and for his cause of action against the United States of America, defendant, respectfully shows:

I

Plaintiff, Guy A. Thompson, is a resident of the State of Missouri and is the duly appointed, qualified and acting Trustee of the Missouri Pacific Railroad Company, a railroad corporation organized and existing under the laws of the State of Missouri, with principal office at St. Louis, Missouri; said railroad company is a common carrier by railroad and, as such, is subject to the provisions of the Interstate Commerce Act, ~~as amended~~, 49 U. S. C., Section 1.

II

Defendant is the United States of America.

III

This action arises under an Act of Congress, approved June 25, 1948, 62 Stat.   , U. S. C., Title 28, Sections 1336, 1398, 2284 and 2321-2325, inclusive, as hereinafter more fully appears. The action is one to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission.

[fol. 2]

IV

On July 10, 1950, the Interstate Commerce Commission (hereinafter called the Commission), in a proceeding entitled Omaha Grain Exchange of Omaha, Nebraska, v. Missouri Pacific Railroad Company (Guy A. Thompson, Trustee) et al., Docket No. 29,461, issued an order requiring the defendants therein to establish and maintain and apply to the transportation, in carloads, of grain and grain products, from points in Kansas (located on the Missouri Pacific Railroad west of Concordia, Kan.) to Omaha, Nebr., and Council Bluffs, Iowa, via Concordia, Kan., over the route of the Missouri Pacific to Concordia, thence Chicago, Burlington & Quincy Railroad beyond, rates which shall not exceed rates on like traffic from the same origins to Kansas City, Mo. Copy of the report and said order are attached hereto as Exhibit 1 and made a part hereof.

Attached hereto as Exhibit 2 and made a part hereof is report of the Commission (Division 2) of August 31, 1948.

Attached hereto as Exhibit 3 and made a part hereof is order of the Commission of January 8, 1951, denying petitions for reconsideration.

Attached hereto as Exhibit 4 and made a part hereof is order of the Commission of January 23, 1951, postponing the effective date of the order of July 10, 1950, to March 19, 1951, upon thirty days' notice.

V

In ordering said rates established the Commission has assumed a through route exists over the described route through Concordia, Kan., to Omaha, Nebr., and Council Bluffs, Ia., without evidence in the record to support such an assumption and the correctness of its decisions depends upon this unsupported assumption.

VI

There is not now and never has been a through route from the Kansas origins to Omaha, Nebr., and Council Bluffs, Ia., over the Missouri Pacific and Chicago, Burlington & Quincy Railroad, via Concordia, Kan., over which the Commission ordered said rates to be published.

VII

The order of the Commission, if allowed to become effective, will establish a through route in connection with the Missouri Pacific and Chicago, Burlington & Quincy Railroads via Concordia, Kan., from the origins to the destinations involved, in contravention of Section 15 (3) and (4) of the Interstate Commerce Act, Part I.

[fol. 3]

VIII

In issuing its order the Commission erred, misconstrued the law, and acted unlawfully, contrary to and without support in the evidence, and without necessary preliminary findings which are essential for it to make under Section 15 (3) and (4) of the Interstate Commerce Act before it may lawfully order joint rates published over the route described in IV above, or before it may lawfully order the establishment of a through route as referred to in VI above.

IX

The Missouri Pacific Railroad has a single line route from the Kansas origins involved to Omaha, Nebr., and has published just and reasonable rates on grain and grain products over said single line route

X

The order of the Commission arbitrarily and without evidence to support it and without legal justification deprives the Missouri Pacific Railroad of its long haul over its single line route and revenue therefrom on grain traffic which it originates and which it is entitled to haul from the places of origin to the places of destination, contrary to the provisions of Section 15 (3) and (4) of the Interstate Commerce Act, and without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

XI

Said order is based on erroneous conclusions of law and fact, is contrary to and without support in the evidence, and is contrary to public interest.

XII

By reason of the arbitrary and capricious action of the Commission in entering its order of July 10, 1950, plaintiff is left without an adequate remedy at law and will be subject to irreparable damage if the relief hereinafter prayed for is not granted.

Wherefore, plaintiff prays:

1. That, pursuant to the statutes referred to in paragraph III hereof, there shall be constituted to hear this case a special court of three judges, one of whom shall be a Circuit Judge;

2. That process issue against defendant, United States of America;

3. That, after not less than five days' notice to the Attorney General of the United States, the United States Attor- [fols. 4-7] ney, and such other persons as may be defendants, the Court, after hearing, by temporary injunction, enjoin and restrain enforcement of the order of the Commission (Exhibit 1) pending final hearing and determination of this suit.

4. That the Court, pending hearing and determination of plaintiff's application for temporary injunction, by order, temporarily restrain enforcement of the order of the Commission (Exhibit 1).

5. That, upon final hearing of this cause, the Court adjudge that the order of the Interstate Commerce Commission (Exhibit 1) is predicated upon a misconstruction of the Interstate Commerce Act, unlawful, beyond the power of the Commission, arbitrary, capricious, unsupported by essential findings, and contrary to and without support in the evidence; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation and execution of said order; and that plaintiff may have such other and further relief as may be deemed proper by the Court.

Respectfully submitted, T. T. Railey, Geo. W. Holmes, Toll R. Ware, Attorneys for Plaintiff., 2008 Missouri Pacific Building, St. Louis 3, Missouri.

Notices and other documents served on plaintiff should be served on Toll R. Ware, 2008 Missouri Pacific Building, St. Louis 3, Missouri. Phone Main 1000, Extension 380.

[fol. 8] EXHIBIT 1 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 29,461

OMAHA GRAIN EXCHANGE OF OMAHA, NEBR.,

v.

MISSOURI PACIFIC RAILROAD COMPANY (GUY A. THOMPSON, Trustee) et al.

Decided July 10, 1950

Upon reconsideration, finding in prior report, 272 I. C. C. 368, that rates on grain and grain products, in carloads, from points on the Central Branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof, to Omaha, Nebr., and Council Bluffs, Ia., are unreasonable, affirmed, and an appropriate order entered.

Additional appearances:

James B. Gray and Robert H. Stahlheber for a defendant.
J. W. Holloway for an intervener.

Report of the Commission on Reconsideration

By the Commission:

In the prior report, 272 I. C. C. 368, division 2 found that assailed combinations of local rates on grain and grain products, in carloads, from points on the Central Branch of the Missouri Pacific Railroad Company (Guy A. Thompson, trustee) in Kansas, Concordia and west thereof, to Omaha, Nebr., and Council Bluffs, Ia., over that line to Concordia, and thence over the line of the Chicago, Burlington & Quincy

Railroad Company, hereinafter called the Burlington, are and for the future will be unreasonable to the extent that they exceed or may exceed rates on like traffic from the same origins to Kansas City, Mo. Over the single-line route of the Missouri Pacific, rates to Omaha and Council Bluffs are 6.5 cents higher than rates to Kansas City, excluding increases authorized in 1946 and thereafter, and the combi- [fol. 9] nation rates assailed exceed the corresponding single-line rates.[1] The entry of an order was deferred to afford the Missouri Pacific an opportunity to establish rates over its single-line route on the basis found reasonable. The Missouri Pacific declined to do so.

We reopened the proceeding for reconsideration upon further consideration of the record and upon consideration of petitions of the Kansas-Missouri River Mills for reargument and reconsideration, of the Atchison Board of Trade, J. C. Lysle Milling Company, and the Board of Trade of Kansas City, Mo., for reconsideration, which was adopted by the St. Joseph Grain Exchange, of the Topeka Chamber of Commerce and the Topeka Traffic Association for reargument and reconsideration, and of defendant trustee of the Missouri Pacific for reconsideration. The Kansas-Missouri River Mills, an association of flour mills at Kansas City and numerous points in Kansas, had been permitted to intervene after the decision by the division.

All of the petitioners oppose any reduction in rates over any route from and to the points embraced in the complaint. It is their position that the rates from and to these points, and their relation to the rates to Kansas City, are consistent with the general plan and system of rates to rate-break points established pursuant to our findings in the general investigation of rates on grain and grain products. The facts stated in the prior report will be repeated only to the extent deemed necessary.

The Central Branch of the Missouri Pacific extends westerly in Kansas from Atchison through Concordia to Lenora, 293 miles. West of Concordia, 155 miles from Atchison, other branches extend from the main stem of the Central Branch to Stockton and Burr Oak, Kans., and Hastings, Nebr. At Concordia, about midway between Atchison and Lenora, the Central Branch connects with a branch of the Burlington, which extends thence in a north-northeasterly direction 198.2 miles to Omaha. At Atchison the Central Branch also connects with the main north-south line of the Missouri Pacific from Kansas City to Omaha. The distance from Concordia, a typical origin, to Omaha over the single-line route of the Missouri Pacific through Atchison is 311.6 miles, or 113.4 miles longer than the short-line distance from Concordia to Omaha over the Burlington. From Concordia and points on the Central Branch west thereof, the distances over the Missouri Pacific are 5 miles longer to Kansas City than from the same points to Omaha over the joint Missouri Pacific-Burlington route through Concordia. The rate of the Burlington from Concordia to Omaha is the same as that of the Missouri Pacific from Concordia to Kansas City, thus giving effect to the approximately equal distances to Omaha [fol. 10] and Kansas City from Concordia, but from points west of Concordia on the Central Branch, where the same near parity of short-line distances to Kansas City and Omaha obtains, the rates to Omaha are considerably higher than they are to Kansas City, being as much as 11 cents higher to Omaha from Lenora for 5 miles less distance over the Missouri Pacific-Burlington short route through Concordia.

---

[1] Rates and differences in rates are stated herein in amounts per 100 pounds, and do not include the general increases authorized in 1946 and subsequently.

From Belleville, Kans., 18 miles north of Concordia, the Omaha-Denver, Colo., line of the Chicago, Rock Island and Pacific Railway Company (Rock Island) extends westward through Kansas immediately north of and paralleling the Central Branch. From Phillipsburg, Kans., on the Rock Island, the rate is 19 cents to Omaha, 243 miles, and to Kansas City, 299 miles, but from Glade, Kans., on the Central Branch, 8 miles across country from Phillipsburg, the lowest rate available to Omaha is the single-line rate of 25.5 cents for 398 miles over the circuitous route of the Missouri Pacific through Atchison. Over the short joint route of the Missouri Pacific from Glade to Concordia and the Burlington thence to Omaha, 285 miles, a combination rate higher than 25.5 cents is in effect, but from Glade to Kansas City, 290 miles, the Missouri Pacific's rate is only 19 cents. Other illustrations to the same effect are shown at pages 370 and 371 of the prior report herein.

Complainant seeks removal of these rate disparities against Omaha, alleging that its rates are unreasonable and unduly prejudicial. It supports these allegations by extensive rate comparisons and commercial testimony, which is set forth in the prior report. Defendant, Missouri Pacific, justifies the existing rate disparities against Omaha and preferences of Kansas City on the ground that the distances over its circuitous single-line route to Omaha from the Central Branch are about 108 miles longer than they are over its single-line route to Kansas City, and therefore fully warrant the assailed higher rates to Omaha, that the joint route through Concordia and the Burlington short hauls it, and that the provisions of sections 15 (3) and (4) of the act prevent us from according the relief sought by complainant.

Kansas City and Omaha are rival Missouri River primary grain markets. In the general western grain investigation we prescribed rate-break combinations of rates to and from these markets; that is, flat rates thereto and proportional rates therefrom, on the same general level. From points in southern Nebraska, such as Superior, about 40 miles north of the Central Branch points in issue here, we prescribed rates to Omaha 2 cents less than to Kansas City, in recognition of shorter distances to Omaha than to Kansas City. From points in Kansas on and south of the Kansas City-Denver main line of the Union Pacific, about 40 miles south of the Central Branch, we prescribed rates 6 cents (now 6.5 cents) lower to Kansas City than to Omaha, in recognition of distances much less to Kansas City than to Omaha. In [fol. 11] the territory between these two related regions, which includes the Central Branch and other points in northern Kansas, no specific rates were prescribed to Omaha, the finding being that the rates should be reasonably related to the rates from neighboring key points. During a period in 1931 and 1932, when the original order in the western grain-rate investigation was effective, the Missouri Pacific established rates from points on the Central Branch the same to Omaha as to Kansas City, and grain moved under such rates over that line to Omaha in volume, but upon solicitation of grain dealers and millers at the competing Missouri River markets, this adjustment was changed and the higher adjustment here complained of was established. The Rock Island, which serves the same general territory, continued a parity of rates to Omaha and Kansas City which it had established from points on its line, as did also the Burlington.

Kansas City, Omaha and the affected origins on the Central Branch are all in western trunk-line territory. The general basis of key-point rates to the rate-break markets prescribed in the grain investigation was 91 percent of the western trunk-line grain scale prescribed in the original report in the same proceeding for movements in western trunk-line territory other than to rate-break markets. All of these rates were based on the shortest distances over routes by which carload traffic could be interchanged without unloading. Based on such distances, the rates to Kansas City from points on the Central Branch considered herein average 90 percent of that scale, and the assailed rates from the same points to Omaha average 126 percent of the scale. The rates sought, based on distances over the Concordia route, average 92 percent of the scale. We therefore conclude, as did division 2 in the prior report, that the assailed rates are not made with reasonable relation to the rates from neighboring key points as contemplated by our findings in the western grain-rate investigation, that they are not reasonably related to the rates on like traffic from the same origins to Kansas City, and that they fail to reflect the general level of gathering rates to the markets from other points in the same general area.

Referring now to the Missouri Pacific's contention that section 15 (3)[2] and (4)[2] of the act prevent us from according the relief sought by complainant: These are the so-called short-hauling sections. The first authorizes us, after full hearing, to establish through routes and joint rates whenever we deem same to be necessary or desirable in the public [fol. 12] interest. The second is a limitation upon our power to establish the through routes authorized to be established in the first provision, such limitation prohibiting us from short-hauling a carrier without its consent under the conditions specified in the section. As through routes are already in existence at combination rates over the short routes through Concordia by way of the Missouri Pacific and the Burlington, and the only relief here sought by complainant being reasonable rates over those routes, division 2 correctly concluded that it was unnecessary to discuss the provisions of section 15 (3) and (4), and that those provisions of the act were no bar to the prescription of reasonable rates over such routes, citing Virginian Ry. v. United States, 272 U. S. 658, 666. In that case through routes were also in effect at combinations of through rates, and there was no request for joint rates. Our order requiring the combinations to be reduced to a reasonable level was upheld by the United States Supreme Court.

---

[2] Section 15 (3) of the act, to the extent here pertinent, provides that the Commission "may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates"; and paragraph (4) of this section, to the extent here pertinent, provides that in establishing a through route by rail the Commission shall not

We have consistently held that a through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another; that a joint rate is not essential; and that the through rate may as well be a combination of locals or proportionals. See Grain and Grain Products, 129 I. C. C. 261, 264, and cases there cited. Our order in that proceeding, challenged on the ground that it was in contravention of the short-hauling provisions of section 15 of the act, was upheld in Atchison, T. & S. F.

(except as provided in section 3) require any carrier by railroad, without its consent, "to embrace in such route substantially less than the entire length of its railroad," which lies between the termini of such proposed through route unless "such inclusion of lines would make the through route unreasonably long" or unless the Commission finds "that the through route proposed to be established is needed in order to provide adequate and more efficient or more economic transportation."

R. Co. v. United States, 279 U. S. 768, the Court there stating, at pages 776-7:

> The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through routes and joint rates was not conferred until 1906. Act of June 29, 1906, c. 3591, section 4, 34 Stat. 584. There is not in that act as amended, see United States v. The American Express Company, 265 U. S. 425, 430, note 2, or in any decision of the Commission applying it, to which attention has been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates.

The rates in issue here are assailed as being unreasonable and unduly prejudicial under sections 1 and 3 of the act. Complainant does not seek through routes because, as previously stated, it already has such routes and can use them if it elects to pay the excessive combination rates in effect over such routes. Nor does it here seek the prescription of joint rates. The form of the through rates, whether joint or combination, is of no particular concern to complainant so [fol. 13] long as such rates are not unreasonable nor unduly prejudicial. We think it is clear that the assailed combination through rate of 30 cents from Lenora to Omaha, for example, over the Missouri Pacific-Burlington route through Concordia, is unreasonable as compared with a rate of 19 cents from Lenora to Kansas City for a haul 5 miles longer than to Omaha. We also think it is clear that the next above-quoted excerpt from the Court's decision there cited authorizes us, in the situation presented here, to prescribe reasonable and nonprejudicial rates from the Central Branch to Omaha, and that the provisions of sections 15 (3) and (4) are no bar to such action.

Upon reconsideration of the record herein, we find that the rates assailed from points on the Central Branch of the

Missouri Pacific to Omaha and Council Bluffs, are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates on like traffic from the same origins to Kansas City. The findings of division 2 in the original report are affirmed.

An appropriate order will be entered.

Commissioners Patterson, Mitchell and Cross dissent.

Chairman Johnson, being necessarily absent, did not participate in the disposition of this proceeding.

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of July, A. D. 1950.

No. 29,461

OMAHA GRAIN EXCHANGE OF OMAHA, NEBRASKA,

v.

MISSOURI PACIFIC RAILROAD COMPANY (GUY A. THOMPSON, Trustee) et al.

It appearing, That on August 31, 1948, division 2 made and filed its report in the above entitled proceeding, and that on July 6, 1949, the Commission reopened the proceeding for reconsideration;

It further appearing, That this proceeding has been reconsidered, and that the Commission, on the date hereof, has made and filed a report on reconsideration, which said report and the aforesaid report of August 31, 1948, are hereby referred to and made parts hereof:

[fol. 14] It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 20, 1950, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of grain and grain products, in carloads, from and to the points designated in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph:

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 20, 1950, upon notice to this Commission and to the general public by not less than 30 days filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation, in carloads, of grains and grain products, from points in Kansas described in the complaint to Omaha, Nebr., and Council Bluffs, Ia., via Concordia, Kans., over the route therein specified, rates which shall not exceed rates on like traffic from the same origin to Kansas City, Mo.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission. W. P. Bartel, Secretary. (Seal.)

[fol. 15] EXHIBIT 2 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 29,461

OMAHA GRAIN EXCHANGE OF OMAHA, NEBRASKA,

v.

MISSOURI PACIFIC RAILROAD COMPANY. (GUY A. THOMPSON, Trustee) et al.

Submitted October 25, 1946. Decided August 31, 1948

Rates on grain and grain products, in carloads, from points on the Central Branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof, to Omaha, Nebr., and Council Bluffs, Ia., found unreasonable.

Entry of order deferred.

John A. Kuhn for complainant.

Toll R. Ware, Geo. W. Holmes, Glenn S. Givens and H. H. Larimore for defendants.

W. R. Scott, W. S. Allison, E. L. Peterson, E. C. Owens, C. F. Real and N. K. Thomas for interveners.

Report of the Commission

Division 2, Commissioners Aitchison, Splawn and Alldredge

By Division 2:

Complainant filed exceptions to the proposed report of the examiner, to which defendants and intervener St. Joseph Grain Exchange replied. Three of the other interveners filed exceptions for clarification only. Our conclusions differ from those recommended by the examiner. Exceptions and requested findings not specifically discussed have been considered and found not justified.

Complainant is a corporation whose membership includes merchants, manufacturers and millers buying, selling, re- [fol. 16] ceiving, processing and shipping grain and its products. By complaint it alleges that the rates [1] on grain and grain products from points in Kansas on the line of the Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), Concordia and west thereof, known as the Central Branch, applicable over that railroad to Concordia, thence the line of the Chicago, Burlington & Quincy Railroad Company (hereinafter called the Burlington) to Omaha, Nebr., and Council Bluffs, Ia., herein called the Concordia route, are unreasonable and unduly prejudicial. We are asked to prescribe reasonable rates for the future. The Board of Trade of Kansas City, Mo., The Saint Joseph Grain Exchange, the Atchison Board of Trade, of Atchison, Kan., The Topeka Chamber of Commerce, and Topeka Traffic Association of Topeka, Kans., and The J. C. Lysle Milling Company of Leavenworth, Kans., intervened in opposition to the complaint.

A line of the Missouri Pacific parallels the west bank of the Missouri River from Kansas City through Leavenworth and Atchison to Omaha, the latter being the northern terminus. From Atchison a line crosses the river and extends northeastward to St. Joseph and another line, the Central

---

[1] Rates and differences in rates are stated herein in amounts per 100 pounds and do not include the general increases authorized in 1946 and subsequently.

Branch, extends westward through Concordia to Lenora, 155 and 293 miles, respectively, west of Atchison. West of Concordia other branches extend from the main stem of the Central Branch to Stockton and Burr Oak, Kans., and Hastings, Nebr. The Burlington extends northeastward from Concordia to Wymore, Nebr., thence northward to Lincoln, Nebr., and northeastward to Omaha, 117 miles. It also has a line eastward from Wymore through Table Rock, Nebr., to Napier, Mo., thence northward to Council Bluffs and Omaha. Another branch connects Lincoln and Table Rock. Main lines of The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees), hereinafter called the Rock Island, extend from Omaha southwestward and from St. Joseph and Kansas City generally westward, converging at Belleville, Kans., about 18 miles north of Concordia, from which point the line extends westward, paralleling the Central Branch on the north.

During a period in 1931 and 1932 when the original order of the Commission entered in the western grain rate investigation was effective, rates from points on the Central Branch were the same to Omaha as to Kansas City, and grain moved under such rates over the Missouri Pacific to Omaha in volume. On solicitation of grain dealers and millers at the competing Missouri River markets this adjustment was changed. In the first report in that investigation the Commission fixed rates from points on and south of the line of the Union Pacific Railroad Company between Kansas City and Denver, Colo., 6 cents higher to Omaha than to Kansas City. This line, through Kansas, is from [fol. 17] 30 to 50 miles south of the Central Branch, but the Missouri Pacific adopted the same differential in publishing rates from the Central Branch to Omaha and Kansas City and this differential, now 6.5 cents, is still maintained. The original findings in the grain investigation were later set aside, and in the second report rates from points not named were required to be made with reasonable relation to prescribed rates from key points.

It is complainant's position that as the route from Concordia, and points west thereof, over the Burlington from that junction to Omaha, is 5 miles shorter than the route of the Missouri Pacific to Kansas City, Omaha is entitled to an equality in rates with Kansas City. The rate of the Burlington from Concordia to Omaha, short line distance 187.4 miles, is 16 cents, the same as from Concordia to Kansas City, over the Misouri Pacific, for a distance 5 miles greater. The rates assailed over the Concordia route are combinations of locals to and from Concordia. The rate from Lenorá, 336 miles to Omaha over that route, is 30 cents, as compared with 25.5 cents over the single-line route of the Missouri Pacific, and 19 cents to Kansas City, 341 miles. Rates from points on the Central Branch to Kansas City are, for distances over the Missouri Pacific of 208 miles, 16 cents; 215 to 237 miles, 17 cents; 240 to 282 miles, 18 cents, and 279 to 341 miles, 19 cents; and complainant seeks the same rates to Omaha for distances over the Concordia route which are 5 miles less.[2] From Hastings and Superior, Nebr., on the Hastings Branch, to Omaha the rate of the Missouri Pacific is 15 cents, a key-point rate prescribed in the grain investigation. Both of these points are also served by the Burlington. From Warwich and Republic, Kans., on the same branch, 9 and 16 miles south of Superior, the rate to Omaha over the Missouri Pacific to Superior, then Chicago & North Western Railway Company, 192 and 199 miles, is 20 cents, or 3 cents higher than the rate to Kansas City. From Phillipsburg, Kans., on the Rock Island, 94 miles west of Belleville, the rate is 19 cents to Omaha, 243 miles, and to Kansas City, 299 miles. About 8 miles across country from Phillipsburg is Glade, on the Central Branch, from which the single-line rates of the Missouri Pacific are 25.5 cents to Omaha, to which the distance is 285 miles, over the Concordia route, and 19 cents to Kansas City, 290 miles.

The general basis of key-point rates to the rate-break markets prescribed in the grain investigation was 91 percent of the western trunk-line grain scale. Based on short-line distances the rates to Kansas City from points on the Central Branch considered herein average 90 percent of that scale, and the rates from the same points to Omaha average 126 percent of that scale. The level of combination rates over the Concordia route as measured by the same scale is not shown but obviously it is much higher. [fol. 18] The rates sought, based on distances over the Concordia route average 92 percent of that scale.

---

[2] The same rates apply to Atchison, 47 miles less distant, St. Joseph, 27 miles less distant, and Leavenworth, 28 miles less distant, than Kansas City.

Rates to points beyond the Missouri River markets are combinations based on those markets. As illustrating the adjustment to such points, it is shown that from Lenora to Chicago, Ill., the rate by way of Kansas City is 35 cents, made of factors of 19 cents and a proportional of 16 cents, while the rate by way of Omaha is 41.5 cents, made of factors of 25.5 cents and a proportional of 16 cents. The distance by which the 35-cent rate applies, over the Missouri Pacific by way of Kansas City to Omaha, thence the Burlington to Chicago, is 1,041 miles,[3] while the distance by which the 41.5-cent rate applies, over the Missouri Pacific through Atchison to Omaha, thence Burlington to Chicago, is only 943 miles, and the distance over the Concordia route is 836 miles.

On grain from Lenora to points in Arkansas and to Memphis, Tenn., the Missouri Pacific allows transit at Topeka without additional charge. The distance over this line by way of Kansas City to Topeka, thence back to Kansas City is 606 miles, and the rate factor to Kansas City is 19 cents. This complainant contrasts with the rate of 25.5 cents from Lenora to Omaha over the same railroad through Atchison, 443 miles. At the time of hearing the Missouri Pacific was planning to publish, and has since published, routing authorizing application of the 16-cent proportional rate from Omaha to Chicago by way of Kansas City and St. Louis, thence over the line of Chicago and Eastern Illinois Railway Company, a distance of 769 miles, whereas the short tariff route from Omaha to Chicago is 488 miles. These examples of distances over which the present rates apply are given to refute any contention of the Missouri Pacific that a rate 6.5 cents higher to Omaha than to Kansas City is justified by a greater distance of 102 miles over its own route. It is complainant's view that the Missouri Pacific should establish the same rate over its own rails to Omaha as in effect to Kansas City; but as after negotiation it was unable to persuade the carrier to publish the same rate to both primary markets, it filed this complaint.

---

[3] The short-line distances are 783 miles by way of Atchison, Leavenworth or Kansas City and 784 miles by way of St. Joseph.

The Omaha Elevator Company is in the grain merchandising business and operates an elevator in Omaha having a capacity of 2.5 million bushels. It handles considerable grain from points in Kansas on the Rock Island and Burlington, and occasionally some from a few points in Kansas on the Union Pacific, from which rates are the same to Omaha as to Kansas City; but it receives none from points on the Missouri Pacific or other railroads from which the rates are higher to Omaha than to Kansas City, although before the Nebraska crop is ripened it would be very desirable to be able to draw from those Kansas points.

[fol. 19] The Maney Milling Company manufactures flour at Omaha, and at the time of hearing was producing about 1,800 barrels a day. Seventy-five or 80 percent of its output is shipped to points east of the Indiana-Illinois State line in competition with flour from other mills located on the Missouri River and elsewhere. Its rates to the East on flour are the same as those from Kansas City. It would like to be able to draw wheat from the Central Branch, but competition in the sale of flour is so keen that it cannot use grain from points from which the rate is 6.5 cents higher to Omaha than to Kansas Ciy. At times a difference in price of a half cent a barrel of 200 pounds of floor has been sufficient to divert sales.

At Omaha the Farm Crops Processing Corporation operates a plant producing alcohol and syrup, and uses about 20 carloads a day of wheat, corn and sorghum grains. Its most direct competition is with an alcohol plant at Kansas City. It purchases grain at Kansas points on the Rock Island, Burlington and lines of The Atchison, Topeka and Santa Fe Railway Company from which the rates are the same as to Kansas City, but has not been able to purchase grain at points on the Central Branch because of the higher freight rates.

The defense was assumed by the Missouri Pacific, for convenience sometimes hereinafter referred to as defendant. The Central Branch is one of the lines of lightest traffic density of this defendant's system lines. The grain which originates on this branch is predominantly wheat. Grain, aggregating 6,414 carloads, constituted nearly 80 percent of the traffic originated west of Concordia in 1945. The inbound traffic consisted principally of coal, petroleum products and sand and gravel.

The following are representative of differences between distances over the Missouri Pacific and over the Concordia route:

	From		
	Lenora, Kans. Miles	Harlan, Kans. Miles	Jamestown, Kans. Miles
Distance over the Missouri Pacific route	449.5	378.1	322.6
Distance through Concordia and the Burlington	336.1	264.7	209.2
Difference	113.4	113.4	113.4
Percent of Circuity of the Missouri Pacific route	33.7	42.7	54.2

The percentage of circuity of defendant's route ranges from 33.7 to 57.2, and averages 44.8. The ratio which the Missouri Pacific's haul bears to the entire haul over the Concordia route ranges from nothing from Concordia to 41 percent from Lenora, and averages 21.7 percent.

[fol. 20] Defendant's history of its rates to Omaha shows that in July, 1931, rates from the origins here considered were on wheat 8 or 8.5 cents higher to Omaha than to Kansas City, Atchison, Leavenworth and St. Joseph. On August 1, 1931, following the first report in the general grain-rate investigation, the difference was made 6 cents. On August 22 of that year the rates to Omaha were reduced to the level of the Kansas City rates, but on February 20, 1932, the rates of July, 1931, were restored. On July 1, 1935, following the report on rehearing in the grain-rate investigation, all the rates were slightly reduced and the rate difference became 6 cents. This difference became 6.5 cents on July 15, 1938, as the result of a general rate increase authorized by this Commission.

Defendant does not participate in joint rates on grain from the producing territory served by it to the primary markets or rate-break points except from certain Nebraska, points on its branch which extends to Hastings, the two Kansas points on the same branch, and from points just over the Kansas-Nebraska State line. From those points its own route to Omaha would be extremely circuitous, and publication of the joint rates from the Nebraska points was required by the Nebraska State Railway Commission.

Hay and livestock move from points on the Central Branch in some volume. The rates on hay from the origins here considered to Omaha range from 7 to 14 cents higher than to Kansas City. Similarly, the rates on livestock are higher to Omaha than to Kansas City.

The Blair Elevator Corporation, which conducts a general grain merchandising business and manufactures commercial feed at Atchison and the Atchison Board of Trade, oppose the opening of the new route sought on the ground that it would divert grain which otherwise would move to or through Atchison. Atchison is a primary grain market and has State inspection service. It is claimed that any serious curtailment in the volume of grain moving through this market would result in the loss of inspection service.

The J. C. Lysle Milling Company is engaged in the manufacture of flour and mill feeds at Leavenworth. Its elevator capacity is a quarter of a million bushels, and its mill production 4,000 sacks a day. The Central Branch is an important source of its wheat supply. This company has customers at Sioux City, Ia., and Sioux Falls, S. Dak., to whom it has shipped several carloads a month for many years. It therefore opposes reductions as sought in rates to Omaha.

The Board of Trade of Kansas City is an association of grain merchants, flour millers and feed manufacturers doing business in Kansas City, Mo.-Kans. The St. Joseph Grain Exchange is a similar association operating at St. Joseph. Both of these cities are large grain markets, and their [fols. 21-23] merchants, millers and processors are in competition with other Missouri River markets. The first-named intervener attempted to show that the rates from the origins here considered to Omaha are reasonable in comparison with the western trunk-line scale of grain rates; but the rates used in comparison are the single-line rates of the Missouri Pacific and not the combination rates in connection with the Burlington, which are assailed by the complaint. Because about 95 percent of the grain shipped into the Missouri River markets eventually moves out as grain or grain products and the bulk of such outbound movement is on proportional rates, as a result of which the inbound rates become components of through rates, both of these interveners made an elaborate showing of such through rates and the effect on such through rates of the reductions sought by complainant. We have considered this evidence, but do not consider it controlling in the circumstances here presented.

We are of the opinion that the rates in issue are not made with reasonable relation to the rates from neighboring key points as contemplated by the findings in the western grain rate investigation, that they are not reasonably related to the rates on like traffic from the same origins to Kansas City, and fail to reflect the general level of gathering rates to the markets from other points in the same general area.

The provisions of section 15 (3) and (4) of the Act are invoked by defendants as preventing us from according the relief sought by complainant in that the Missouri Pacific would thereby be short-hauled. The joint routes via Concordia are the short routes over which combination rates presently apply. The provisions relied upon do not preclude us from determining and prescribing reasonable rates over that route. *Virginia Ry. v. United States*, 272 U. S. 658, 666. Establishment of such rates over the single-line route of the Missouri Pacific apparently would satisfy the complaint and we see no reason why that defendant should not be afforded an opportunity to do so.

We find that the rates assailed from points on the Central Branch of the Missouri Pacific to Omaha and Council Bluffs are and for the future will be unreasonable to the extent that they exceed or may exceed rates on like traffic from the same origins to Kansas City.

Entry of an order will be deferred to afford the Missouri Pacific an opportunity to establish the rates herein found to be reasonable. If such rates are not established within a reasonable time complainant may petition for entry of an appropriate order.

By the Commission, Division 2.

W. P. Bartel, Secretary. (Seal.)

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed April 16, 1951

Now comes the United States of America, defendant, and for answer to the complaint of plaintiff filed in the above captioned action admits, denies and avers as hereinafter set forth:

1. Answering the allegations in paragraphs I to IV, inclusive, the United States admits the same. For further answer to the last sentence of paragraph IV, the United States avers that the effective date of the Commission's order of July 10, 1950, has been further postponed until May 19, 1951.

2. Answering the allegations in paragraph V, the United States admits that the Commission's order is based on the fact that there exists a through route between the points involved, but denies that there is no evidence in the record to support this fact.

3. Answering the allegations in paragraphs VI to VIII, inclusive, the United States denies the same.

4. Answering the allegations in paragraph IX, the United States admits that the plaintiff maintains a single line route from the Kansas City origins involved to Omaha, Nebraska, and that it has published rates on grain and grain products over said single line rout The United States avers that [fols. 25-26] the reasonableness of the rates on said single line route are not in issue in this proceeding.

5. Answering the allegations in paragraphs X, XI and XII, the United States denies the same.

6. For further answer to plaintiff's complaint, the United States avers that the report and order therein assailed were made and issued within the Commission's statutory authority upon substantial evidence based on the record as a whole after full and fair hearing, and that the report and order are lawful and valid in all respects. Defendant United States denies that said report and order are invalid for the reasons assigned in plaintiff's complaint, or for any reason whatsoever.

Wherefore, having fully answered the complaint, the United States prays that the relief therein sought be denied and the complaint dismissed with costs to plaintiff, and that defendant, United States, have the benefit of such other and further orders, decrees or relief as may be just and proper.

William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

H. G. Morison, Assistant Attorney General; James E. Kilday, John F. Baecher, Special Assistants to the Attorney General; Drake Watson, United States Attorney, Attorneys for the United States of America, Defendant.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed March 28, 1951

The Interstate Commerce Commission, intervening defendant in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saying and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I, II, and III of the complaint, the Commission admits the same.

II

Answering paragraph IV of the complaint, the Commission admits the issuance of the order referred to therein as well as the report which is made a part of said order, both [fol. 28] of which are attached to plaintiff's complaint as Exhibit I, to which the Commission respectfully refers the

Court for more complete description of the requirements thereof.

Further answering paragraph IV, the Commission avers that the report and orders referred to in the last three sentences of said paragraph, appear to be correctly copied as Exhibits II, III, and IV, respectively, of the complaint herein. It is also averred that the effective date of said order of July 10, 1950, has been further postponed by the Commission, by order dated February 13, 1951, from March 19, 1951, upon thirty days notice, to May 19, 1951, upon like notice, pursuant to the request of the Court to allow time to assemble a three-judge statutory court to hear and decide on the merits the suit filed herein.

III

Answering paragraphs V and VI of the complaint, the Commission denies the same.

IV

Answering paragraph VII of the complaint, the Commission avers that a through route was in existence, prior to its order of July 10, 1950, and continues in existence irrespective of said order, in connection with the plaintiff's railroad and Chicago, Burlington & Quincy Railroad via Concordia, Kans., from the origins to the destinations involved herein, and it is denied that such through route or the prescription of reasonable rates thereover, is or will be in contravention of either Section 15 (3) or 15 (4) of Part I of the Interstate Commerce Act.

V

Answering paragraph VIII of the complaint, the Commission denies that it erred or misconstrued the law or acted unlawfully or contrary to or without support in the [fol. 29] evidence in the issuance of its said order of July 10, 1950. In answer to the remaining allegation of said paragraph, the Commission alleges that its said order was not made under either Section 15 (3) or Section 15 (4) of the Interstate Commerce Act and it was not necessary to make the primary findings as alleged by plaintiff before it may determine question of rates. It is averred that the complainants in the Commission proceedings did not seek a through route with respect to the transportation of grain from the origin points here involved by way of plaintiff's railroad and the Chicago, Burlington & Quincy Railroad as such route was already in existence. It is further averred that the Commission made all necessary findings essential to support its said order.

VI

Answering the allegations of paragraph IX of the complaint, the Commission admits that plaintiff has a single-line route from the Kansas origins involved to Omaha, Nebr., but denies that it has published just and reasonable rates on grain and grain products over said single-line route.

VII

Answering the allegations of paragraph X of the complaint, the Commission denies that its order was issued arbitrarily and without evidence to support it and that said order deprives or will deprive plaintiff of its long haul over its single-line route or that the order will deprive plaintiff of the revenues on grain traffic which it originates on its line from the places of origin to the places of destination thereon, contrary to the provisions of Section 15 (3) and 15 (4) of the Act. The Commission further denies that its said order denies plaintiff of due process of law in violation of the Fifth Amendment to the Constitution.

[fol. 30]

VIII

Answering paragraph XI of the complaint, the Commission denies the same.

IX

Answering paragraph XII of the complaint, the Commission denies that it acted arbitrarily or capriciously in entering its order of July 10, 1950, and it further denies that plaintiff is without adequate remedy in law or that it has been or will be subjected to irreparable damages in the event the relief which it prays is not granted.

X

Further answering, the Commission denies the relevancy or materiality of the affidavit executed by plaintiff's general freight agent, A. Kuepfert, attached to the complaint herein. It is averred that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made, and that plaintiff cannot free itself of this restriction by submitting additional evidence in the form of an affidavit, for the reason that "the evidence received by the Commission may have overbore these affidavits or stripped them of significance." *Miss. Valley Barge Co.* v. *U. S.*, 292 U. S. 282, 286.

XI

The Commission, further answering the complaint, alleges that its report and order of July 10, 1950, were not made or entered either arbitrarily or unjustly, or contrary to relevant evidence or without evidence to support them; that in making said order and report the Commission did not exceed the authority which had been duly conferred upon it and the Commission denies each and all the other allegations to the contrary contained in the complaint.

The Commission further alleges that the findings and [fol. 31] conclusions of said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report and order, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further denies that its said report and order cause, or will cause, plaintiff either irreparable damage or any damage if said report and order are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each and all the allegations contained in the complaint, insofar as they conflict with the allegations herein, or with either the statements or conclusions of fact included in said report referred to and made a part of the complaint as Exhibit I.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by Samuel R. Howell, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, of Counsel.

[fols. 32-33] Certificate of service (omitted in printing).

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE OMAHA GRAIN EXCHANGE, A CORPORATION—Filed March 30, 1951

Comes now Omaha Grain Exchange, a corporation, of Omaha, Nebraska, an intervening Defendant in the above entitled cause and for its answer states that this action is based on a complaint case filed by it before the Interstate Commerce Commission and against this Plaintiff and Chicago, Burlington & Quincy Railroad Company in which it alleged that the freight charges on grain and grain products from points in Kansas on the line of the Missouri Pacific, Concordia and West thereof, known as the Central Branch, applicable over Plaintiff's railroad to Concordia, Kansas, thence the line of the Chicago, Burlington & Quincy to Omaha, Nebraska and Council Bluffs, Iowa, are unjust and unreasonably and unduly prejudicial and for further answers to Plaintiff's complaint filed herein answers as follows, to-wit:

I

Answering Paragraphs I, II and III of Plaintiff's complaint, this intervening Defendant admits the allegations and the facts therein set forth.

II

Answering Paragraph IV of Plaintiff's complaint, this [fol. 35] intervening Defendant admits the allegations, to-wit that on July 10, 1950 the Interstate Commerce Commission issued the order mentioned therein, together with the report which order and report are attached to plaintiff's complaint as Exhibit I, to which this Defendant respectfully refers the Court for more complete description of the requirements thereof.

For a further answer to Paragraph IV, this Defendant avers that the report and orders referred to in last three sentences of Paragraph IV, appear to be correctly copied as Exhibits II, III, and IV, respectively, of the complaint herein. It is also averred that the effective date of said order of July 10, 1950, has been further postponed by the Commission, by order dated February 13, 1951, from March 19, 1951, upon thirty days notice, to May 19, 1951, upon like notice, pursuant to the request of the Court to allow time to assemble a three-judge statutory Court to hear and decide on the merits of the suit filed herein.

III

Answering the paragraphs designated V and VI on Page 2 of the complaint, this Defendant denies each and every allegation, statement and averment therein contained.

IV

For answer to Paragraph VII of the Complaint, this Defendant avers that a through route was in existence, prior to the order of the Interstate Commerce Commission of July 10, 1950, and that said through route continues in existence irrespective of said order, in connection with the Plaintiff's railroad and that of the Chicago, Burlington & Quincy Railroad via Concordia, Kansas, from the origins to the destinations involved herein, and it is denied that such through route or the prescription of reasonable rates thereover, is or will be in contravention of either Sections 15 (3) or 15 (4) of Part I of the Interstate Commerce Act.

V

Answering Paragraph VIII of the complaint, this Defendant denies that the Interstate Commerce Commission [fol. 36] erred or misconstrued the law or acted unlawfully or contrary to or without support in the evidence in the issuance of said order of July 10, 1950. In answer to the remaining allegation of said Paragraph, this Defendant alleges that the said order of the Interstate Commerce Commission was not made under either Section 15 (3) or Section 15 (4) of the Interstate Commerce Act and it was not necessary to make the primary findings as alleged by Plaintiff before the Interstate Commerce Commission could determine the question of rates. It is averred that this Defendant as complainants in the Commission proceedings did not seek a through route with respect to the transportation of grain from the origin points here involved by way of Plaintiff's railroad and the Chicago, Burlington & Quincy Railroad as such route was already in existence. It is further averred that the Interstate Commerce Commission made all necessary findings essential to support its said order.

VI

Answering the allegations of Paragraph IX of the complaint, this Defendant admits that Plaintiff has a single-line route from the Kansas origins involved to Omaha, Nebraska, but denies that it has published just and reasonable rates on grain and grain products over said single-line route.

VII

Answering the allegations of paragraph X of the complaint, this Defendant denies that the order of the Interstate Commerce Commission was issued arbitrarily and without evidence to support it and that said order deprives or will deprive Plaintiff of its long haul over its single-line route or that the order will deprive Plaintiff of the revenues on grain traffic which it originates on its line from the places or origin to the places of destination thereon, contrary to the provisions of Section 15 (3) and 15 (4) of the Act. This Defendant further denies that the [fol. 37] Interstate Commerce Commission's said order denies Plaintiff of due process of law in violation of the Fifth Amendment to the Constitution.

VIII

Answering Paragraph XI of the complaint, this Defendant denies each and every allegation therein contained.

IX

Answering Paragraph XII of the complaint, this Defendant denies that the Interstate Commerce Commission acting arbitrarily or capriciously in entering its order of July 10, 1950, and further denies that Plaintiff is without adequate remedy in law or that it has been or will be subjected to irreparable damages in the event the relief which it prays is not granted.

X

Further answering, this Defendant denies the relevancy or materiality of the affidavit executed by Plaintiff's general freight agent, A. Kuepferf, attached to the complaint herein. It is averred that the findings of the Interstate Commerce Commission may not be assailed upon appeal in the absence of the evidence upon which they were made, and that Plaintiff cannot free itself of this restriction by submitting additional evidence in the form of an affidavit, for the reason that "the evidence received by the Interstate Commerce Commission may have overbore these affidavits or stripped them of significance." *Miss. Valley Barge Co.* v. *U. S.*, 292 U. S. 282, 286.

XI

This Defendant, further answering the complaint, alleges that the report and order of the Interstate Commerce Commission dated July 10, 1950, were not made or entered either arbitrarily or unjustly, or contrary to relevant evidence or without evidence to support them; that in making said order and report the Interstate Commerce Commission did not exceed the authority which had been duly conferred upon it and this Defendant denies each and all the other allegations to the contrary contained in the com- [fol. 38] plaint.

This Defendant further alleges that the findings and conclusions of said report of the Interstate Commerce Commission were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

This; Defendant further alleges that the Interstate Commerce Commission in making said report and order, it considered and weighed carefully, in the light of the Interstate Commerce Commission's own knowledge and experience, each fact, circumstance and condition called to the Interstate Commerce Commission's attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

This Defendant further denies that the Interstate Commerce Commission's said report and order cause, or will cause, Plaintiff either irreparable damage or any damage if said report and order are not enjoined.

Except as herein expressly admitted, this Defendant denies the truth of each and all the allegations contained in the complaint, insofar as they conflict with the allegations herein, or with either the statements or conclusions of fact included in said report referred to and made a part of the complaint as Exhibit I.

Wherefore, this Defendant prays that Plaintiff's complaint herein be dismissed.

Omaha Grain Exchange. By: (Signed) Oscar J. Moberg, Its Attorney, Suite 814 Title Guaranty Building, 706 Chestnut Street, St. Louis 1, Missouri, CHestnut 8907.

[fols. 39-134] Certificate of Service (omitted in printing).

[fol. 135] IN UNITED STATES DISTRICT COURT

Transcript of Proceeding—Filed December 20, 1951

Thursday, June 14, 1951. St. Louis, Missouri.

Before:

Honorable John B. Sanborn, Judge, Circuit Court of Appeals;

Honorable George H. Moore, Judge, District Court of the United States; and

Honorable Rubey M. Hulen, Judge, District Court of the United States.

Transcript of proceedings on hearing of petition of plaintiff to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission entered July 10, 1950.

APPEARANCES:

Toll R. Ware, 2008 Missouri Pacific Building, St. Louis, Missouri, appeared on behalf of the plaintiff.

[fols. 136-137] William J. Hickey, Special Assistant to the Attorney-General, Department of Justice, Washington, D. C., appeared on behalf of the defendant, United States of America.

Samuel R. Howell, Assistant Chief Counsel, Interstate Commerce Commission, 3330 Interstate Commerce Commission Building, Washington, D. C., appeared on behalf of the Interstate Commerce Commission, Intervening Defendant.

Oscar J. Moberg, 706 Chestnut Street, St. Louis, Missouri, appeared on behalf of Omaha Grain Exchange of Omaha, Nebraska, Intervenor.

[fol. 138] STATEMENT OF TOLL R. WARE

Mr. Ware: May it please the Court, this is a suit by Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, to enjoin an order of the Interstate Commerce Commission entered July 10, 1950, in a proceeding instituted by the Omaha Grain Exchange of Omaha, Nebraska. The title of that suit before the Commission is Omaha Grain

Exchange of Omaha, Nebraska versus Missouri Pacific Railroad Company, Guy A. Thompson, Trustee, and Chicago, Burlington and Quincy Railroad Company.

This proceeding is No. 29461 on the Commission's docket, and is reported in 278 I.C.C. at 519.

Now, at this point I would like to introduce in evidence the record before the Interstate Commerce Commission, which is not a complete record but it is a substantial part of the record and all which I believe to be material to the issue here involved.

Judge Sanborn: Is there any objection to that?

Mr. Howell: If Your Honor please, I would like to know what part was left out.

Mr. Ware: I can't tell you here, Mr. Howell, what part was left out. I have itemized in the forepart of my brief all the parts which are included.

Mr. Howell: I think I have seen that. Those things in there will meet our requirements.

Mr. Hickey: I believe the Court should desire to have [fol. 139] the whole record which formed the basis for the Commission's decision before it. It had ruled once before in the same case, involving the same parties, in the absence of such a record, the complete record, that it would not consider the evidence.

Judge Sanborn: Well, I think that so much of the record as you are presenting may be received, with the understanding if it becomes essential the Court may call for the entire record.

Mr. Ware: Very well, sir.

I would like to also introduce in evidence a map, similar to the map which is on the easel, and is the same as the reduced siz- of the map which is attached to copies of plaintiff's briefs which have been filed with the Court and served on the parties in interest.

Judge Sanborn: That may be received.

(The map referred to was received in evidence.)

Mr. Ware: If Your Honor please, the portions of the record which I will refer to, and I will just mention them so that the Court will know that they are in evidence—it is the complaint filed by the Omaha Grain Exchange; the transcript of the proceedings, the entire transcript of the proceedings before the Interstate Commerce Commission; all of the exhibits introduced by all the parties; the [fol. 140] report by the Commission and the order of July 10, 1950, which we seek to have enjoined; and there are various orders of the Interstate Commerce Commission postponing the effective date of the order, and the last one which I refer to in the brief was the one entered on April 9, 1951, postponing the effective date to July 19, upon not less than 30 days' notice. Just recently, I think the day before yesterday—Monday of this week, Judge Moore at my request, asked for a further extension of 60 days, and we have a wire, I have a copy of a wire which was sent to Judge Moore by Commissioner Splown, Chairman of the Interstate Commerce Commission, advising that the Commission's order had been further postponed for 60 days from July 19 for the convenience of the Court. I compute that it would become effective on September 17.

I would like to introduce a copy of that wire into evidence.

Judge Sanborn: It may be received.

(Copy of the wire referred to received in evidence.)

Mr. Ware: In order that the Court might get a picture of the situation which is here involved, I would like to refer to the map on the easel, just for a moment.

Here is the State of Kansas and here is Nebraska. This dark heavy black line is a line of the Missouri Pacific. It extends from these Kansas points; it is what is known [fol. 141] as the central branch of the Missouri Pacific Railroad. It extends from these Kansas origins, all west of Concordia—This is Concordia, indicated by the red dot—it extends from those points via Atchison to Omaha. That is a direct single line route of the Missouri Pacific from all the Kansas origins involved in this case which we are dealing with to Omaha, Nebraska.

From Concordia the Burlington has a line which goes up over this broken line to Omaha, Nebraska. Now, I believe that I have told the Court the material facts about that map and which will all be woven into the argument which I shall present.

Now, the Omaha Grain Exchange of Omaha, Nebraska, on January 14, 1946, filed a complaint with the Interstate

Commerce Commission alleging that the rates on grain and grain products in carloads, from those Kansas origins west of Concordia to Omaha, Nebraska, were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and subjected the complainant to undue prejudice and disadvantage in violation of Section 3 of the Interstate Commerce Act.

The complainant also contended as alleged in its complaint that the line of the Missouri Pacific from each of these Kansas origins to Concordia, thence a line of the Burlington to Omaha would be a practicable route under Section 15 of the Interstate Commerce Act.

[fol. 142] The complaint properly construed was a request by the Omaha Grain Exchange upon the Commission to establish a route composed of the line of the Missouri Pacific to Concordia, thence Burlington beyond, under Section 15(3) of the Interstate Commerce Act, and then prescribed just, reasonable and lawful rates over said route so established.

The Commission's order of July 10, 1950, and which the Missouri Pacific seeks to have enjoined, requires the Missouri Pacific and the Burlington to establish, maintain and apply joint through rates from said points in Kansas to Omaha, Nebraska, over the line of the Missouri Pacific to Concordia, thence Burlington beyond, which shall not exceed rates on like traffic from the same origins to Kansas City, Missouri.

Now, the Commission did not require the route to be established, as it had the power to do under Section 15(3) of the Interstate Commerce Act subject to the limitations imposed upon that power by Section 15(4) as requested by the Omaha Grain Exchange, but as it stated, a through route was already in existence by way of the Missouri Pacific and the Burlington through Concordia.

Now, that is the sole issue in this case. No such through route has ever existed and does not exist at this time and it is, therefore, the position of the Missouri Pacific in this case that there is no evidence of record to support the [fol. 143] Commission's finding or assumption that such a through route does exist from these Kansas origins over the line of the Missouri Pacific to Concordia, Kansas, thence

Burlington beyond to Omaha, Nebraska. I just want to refer now for a moment to that which I say is an admission by the Omaha Grain Exchange, the complainant here, that there was no through route. On sheet 3 of its complaint as filed with the Commission, and I quote it at sheet 7 of my brief, the complainant states this in its complaint, filed with the Commission, and I quote:

> "It is the contention of complainant that the route via Concordia and the C. B. & Q. Railroad is a practicable through route as provided in Section 15 of the Interstate Commerce Act, and that the rates to the market of Omaha should be no greater than the rates to the market of Kansas City. We failed in our negotiations with the Missouri Pacific Railroad to establish such route, hence this complaint."

I think that very language of the complaint itself is an admission on the part of the Omaha Grain Exchange that no such route existed, and it asked the Commission very definitely to invoke its power under Section 15 of the Act and establish such a route.

Now, in the absence of such a route, such a through [fol. 144] route over those two lines, the Commission has no power to prescribe a through rate. A through rate presupposes a through route.

Now, I will go on a little bit further. I want to take up the transcript of record before the Interstate Commerce Commission, and you will find what I have to say at pages 8 and 9 of my brief. At page 10 of the transcript of proceedings before the Commission, the complainant referred to the line to Omaha via Concordia and the Burlington as a practicable through route, and that the Commission was empowered under Section 15(4) to provide that route.

Then, at page 15 of the transcript of the proceedings before the Commission, the complainant stated, and I quote:

> "But since the railroad refused our request—now, they are referring to the Missouri Pacific's refusal to reduce the grain rates over a single line route to Omaha—we filed this complaint and provided for a route via Concordia and the C. B. & Q., which is taken care of under Section 15 of the Act, paragraph 4."

Now, again at page 18 of the transcript of proceedings before the Commission, and you will find that at the top of page 9 of my brief, the complainant again stated, and I quote:

> "We are trying to seek, through the Commission, to [fol. 145] force you to give us a reasonable basis of rates. You wouldn't do it by your own rails, so we have invoked Section 15, paragraph 4, in connection with the Burlington Railroad via Concordia. We think the law is clear on that point."

Now we think the law is clear on that point as stated by the complainant, and having admitted that no through route existed to Omaha over the Missouri Pacific to Concordia, thence Burlington, it could only be established by an order of the Commission under Section 15(3) of the Interstate Commerce Act, but subject to the limitations imposed upon its powers provided in Section 15(4) of the same Act.

Now, I have set out the provisions of Section 15(a) and Section 15(4) on page 9 of my brief.

Now, we come down to this: the complainant, the Omaha Grain Exchange having admitted, in fact, that there was no such through route from these Kansas origins to Omaha over the Missouri Pacific via Concordia thence Burlington, what possible evidence could there be upon which the Commission could assume or find that a through route exists?

Now, there is a physical track connection at Concordia, Kansas, between the Missouri Pacific and the Burlington [fol. 146] Railroad. Physical track connections in and of themselves do not constitute a through route. The Commission has so held repeatedly. I have cited various cases in my brief where the Commission has held to that effect. Now, one is Western Pacific Railroad Company versus Northwestern Pacific Railroad Company, that was decided in 1933, reported in 191 I.C.C. 127. I quote from it on page 11 of my brief, and permit me to quote again. It is brief.

> "Connecting routes do not necessarily constitute through routes over which carriers may be forced to establish joint rates. The rights of connecting carriers afforded by the Act must be safeguarded, and in addi-

> tion the necessity and desirability for the establishment of such through routes must be in the public interest."

Now, the correctness of that conclusion by the Commission there is borne out by the fact that under Section 3(4) of the Interstate Commerce Act, the carriers are required to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding and delivering of property to and from connecting lines.

[fol. 147] Now, if you read the full provisions of Section 3(4) of the Act, you will not find any reference to a route. It just refers to lines.

Now, since we have been required under Section 3(4) to establish a physical track connection for the interchange of traffic between the Missouri Pacific and the Burlington at Concordia, so far as this case here is concerned there would have been no necessity for the enactment at a later date of Section 15(3 and 4). Section 3(4) was a part of the original Act. The language of Section 3(4) has remained substantially unchanged all through these years. Section 15(3) was made a part of the Act in 1906, and I believe Section 15(4) in 1910; and those sections, 15(3 and 4) are still in the Act. There was some modification after 1920, but no modification since 1940.

Now, the Commission said this, in the Western Pacific Railroad Company case, too, that these connecting routes do not necessarily constitute through routes, and prior to that statement, in that decision, and at page 130 of 191 I.C.C., it said this:

> "Should complainant's theory be followed to its logical conclusion,—and complainant's theory there was that track connections established a through route —through routes exist between all points throughout [fol. 148] the country over all railroads wherever physical rail connections are available, even though some of the carriers may be entitled to refuse to join in such through route by the short-haul provision of Section 15(4)."

Now, I think it is clearly apparent here that the physical connection between these two lines at Concordia does not in and of itself constitute a through route.

Now, what other evidence could there be? Is there any evidence of a shipment ever having moved over those two lines under through billing? Now, the record before the Commission is conclusive on that, that there was not. They have never used that line, the Omaha Grain Exchange has never used that line. There has never been a shipment billed through over that line. In fact, they say—and I refer to it at pages 18 and 19 of my brief, where I quote cross-examination by myself of the traffic representative of the Omaha Grain Exchange, and he there states that he has never used this line of the Missouri Pacific, Concordia, thence Burlington to Omaha, that he never used the Missouri Pacific direct to Omaha.

Now, the rate over the Missouri Pacific direct at that time was 25½ cents. The rate of the Missouri Pacific from Lenora was the representative origin for that 25-cent rate; [fol. 149] the rate from north Kansas over the Missouri Pacific to Concordia I believe was 14 cents. This is at the time of the hearing. Over the Burlington from Concordia to Omaha the Burlington rate was 16 cents, so when you add those two rates together you got a combination of 30 cents.

Now, he assailed that rate of 30 cents. There is no attack upon the rate over the Missouri Pacific direct from any of these Kansas origins to Omaha, Nebraska.

Now, the Missouri Pacific has its own single line route from each of these Kansas origins to Omaha, and it maintains rates on grain and grain products over that line which were prescribed by the Interstate Commerce Commission in a general grain rate investigation, 17,000 part 7; and those rates became effective on July 1, 1935, and they have remained in effect unchanged since that date with the exception of the general increases which the Commission has approved here recently, 162, 163, 168 and thence, now 175.

Now, the next point that they might possibly make would be that these combination rates, the local rate of the Missouri Pacific and local rate of the Burlington might be evidence of a through rate. But that is not so. And the Commission has so recognized, and I want to refer to one case which I did not cite in brief, and that was North American [fol. 150] Creamery Company versus American Railway Express Company, decided in 1929, reported in 160 I.C.C. 222; and I will quote from that, and my quotation is from page 225. The Commission there stated:

> "While it is true that combination rates were and are applicable over such routes, this view is not determinative of whether a route is or is not a through route within the meaning of paragraph 4, Section 15 of the Act".

And then I do quote from the New York Port Authority in my brief at page 21. The citation for that is 144 I.C.C. 514, 517, and I will only quote the first sentence of that quotation in my brief:

> "While we—referring there to the Commission—have the power under Section 1 to find combination rates unreasonable upon a proper showing, we must in such cases safeguard the carriers' rights under the short-haul provision of Section 15."

Now, the order of the Commission in this case certainly was not a safeguard of any rights that the Missouri Pacific has under Section 15 of the Interstate Commerce Act. The order if permitted to be made effective would take this traffic away from the Missouri Pacific at Concordia, Kansas. The grease and journal boxes would hardly be warm before they would take it away from us and give it to the Burling- [fol. 151] ton Railroad to carry it on to Omaha, Nebraska, when the Missouri Pacific has a single line route from each of those Kansas origins to Omaha, Nebraska, and is in position to haul all of this grain from these origins to Omaha. That line of the Missouri Pacific is a light density line, and the principal movement is all westbound, and that movement is primarily grain and grain products. Corn, I think comes next of importance, and then livestock. But if we lose that grain traffic from those Kansis origins, and that is a rich wheat producing section in Kansas, it would just almost starve that line to death.

Now, the Commission in its report relies—and it cites two decisions by the United States Supreme Court, one is Atchison, Topeka and Santa Fe Railway Company versus United States, decided in 1929, and reported 279 US 768.

Judge Hulen: May I ask a question before you get off that subject?

Mr. Ware: Yes sir.

Judge Hulen: Why does grain go to Omaha in place of going to Atchison?

Mr. Ware: It mostly moves to Atchison, if Your Honor please, Atchison, Kansas City, these lower groups down here. I don't think very much grain moves over the Mis- [fol. 152] souri Pacific direct to Omaha, Nebraska.

Now, I think the natural market for this grain are these lower Missouri river markets. Omaha is the natural market for grain which comes from this territory up in Nebraska. Now, there is a division which has been made by the Interstate Commerce Commission in the establishment of these rates, and those rates practically control the flow of traffic to these markets, so Omaha is not a natural market for this grain from this territory. Kansas City, Atchison, St. Joe. would be the more proper markets, or the natural markets rather for this grain.

Judge Hulen: Do you contend that the effect of this order is to change the present flow of the grain from Atchison and Kansas City?

Mr. Ware: It could very well do that, yes, sir. It could very well do that. That would be the effect of it.

Judge Hulen: Otherwise you would not be hurt much?

Mr. Ware: No, we would not be hurt. Omaha would come in here and they would get grain from this territory if this order stands at the same rate that Kansas City would get it.

Now, while we are on that subject I wonder if I might not say something else. You know, this case seems fairly [fol. 153] simple, but it is a very, very important case, not from the standpoint of the Missouri Pacific alone but from the standpoint of every railroad in this country. Now, I just want to show you what could very well happen if this order becomes effective, where that grain would be taken away from the Missouri Pacific at Concordia and given to the Burlington and taken to Omaha, Nebraska. Now, that is what we call an interior route.

Now, the Union Pacific has a connection with the Missouri

Pacific here at Frankfort on the map. Now, then, if this order stands the Union Pacific, or anyone who desires to use the Union Pacific from Frankfort, Kansas, could say, "We want a route with the Missouri Pacific via Frankfort to Topeka, thence to Kansas City." We would have to give up that grain going down to Topeka and Kansas City to the UP at Frankfort.

Now, it is not shown on this map, but the Santa Fe Railroad has a connection with the Missouri Pacific at Concordia, Kansas. Now, if this order stands anyone who wanted to use a route of the Santa Fe from Concordia could by the same procedure that the Omaha Grain Exchange has adopted, ask the Commission to establish a rate from these Kansas origins to Kansas City over the line of the Missouri Pacific to Concordia, thence Santa Fe to Kansas City. What would happen to that Missouri Pacific line?

[fol. 154] Now, the Burlington Railroad is a defendant in this case, but the Burlington Railroad has not participated in the proceedings at all either before the Interstate Commerce Commission or here. Now, while it would be the beneficiary of this order and would probably get some revenue out of this grain, it is a principle that would hurt it in the long run.

Now, then, I refer to the Atchison, Topeka and Santa Fe versus United States, 279 US 768. Now, that decision as a whole must be read in order to understand it and apply it to the facts here. The Commission refers to that decision and quotes from it, and the quotation appears at page 12 of the complaint which I filed, and I might just read that. I am quoting now, and this is the quotation:

> "Broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any mandatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through rates and joint rates was not conferred until 1906, act of June 29, 1906, Chapter 3591, Section 4; 34 Statute 584. There is not in that act as amended—see United States versus American Express Company, [fol. 155] 265 US 425-430, note 2—nor in any decision of the Commission applying it to which attention has

been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates".

Now, we do not question the power of the Commission to pass upon the reasonableness of the rates.

A through rate presupposes a through route. Now, in the absence of a through route the Commission has no power to pass upon a through rate over those lines which do not constitute a through route.

Now, we do not question the fact that the Commission would have the power to pass upon the reasonableness of the rate from Lenora, Kansas, to Concordia, Kansas, if it were properly complained of and were proven by the evidence to be unreasonable. Nither would we question the power of the Commission to pass upon the reasonableness of the rate over the Burlington from Concordia, Kansas to Omaha, Nebraska, if it were properly complained of and there was evidence to show that it was unreasonableness. But in the absence of a through route we do question the power of the Commission to prescribe or pass upon a [fol. 156] through rate from these Kansas origins to Omaha, Nebraska.

Now, we just must bear in mind that they are attacking the rate from these Kansas origins to Omaha, Nebraska. They are not attacking the rate from Kansas origins to Concordia or from Concordia to Omaha, Nebraska. They are attacking the through rate, and in the absence of a through rate the Commission has no power to prescribe a through rate.

Now, in the Santa Fe case which they rely upon, and if we read that we will find that, using a representative illustration as the Court did, there was grain moving from Kansas and Colorado, but they use Dodge City on the Santa Fe to the Gulf. The Santa Fe had a through route to the Gulf over which it had a through rate, and it also had a route through Kansas City and thence its line down to the Gulf. For a period of time the rates from Kansas City down to the Gulf were equal for all lines, and the Kansas City Southern, for instance, could compete with the Santa Fe on that movement from Kansas City to the Gulf, but then the Santa Fe came along and it reduced its proportional rate from Kansas City down to the Gulf, and that put the Kansas City Southern out of business on that traffic. So then the Kansas City Southern came along and it reduced its rate so as to get back into that business, and then the Santa Fe, in order to hold that traffic to its line, went out on the inbound rate [fol. 157] from Dodge City to Kansas City and it reduced that rate, I think about 4 cents per 100 pounds, and that reduced rate would only apply in the event that the traffic moved beyond Kansas City over the line of the Santa Fe; and then the Kansas City Southern published some variable rates from Kansas City on down to the Gulf whereby they would be reduced so they could get in on that traffic again.

Now, when the Santa Fe reduced its rate from Dodge City into Kansas City so as to still hold that traffic to its lines, there was complaint filed and the Interstate Commerce Commission enjoined that rate.

Now, then, that brings me right down to the point that I would like to make in connection with that decision. I say that the facts in the Santa Fe case are wholly distinguishable from the facts in this Omaha grain case. In the Santa Fe case the Commission's order dealt solely with the inbound rate to Kansas City. That is all there was before the Commission. The Santa Fe there contended that the Commission by ordering its proposed tariff cancelled, made possible a through route from Dodge City to the Gulf via the Kansas City Southern which compelled the Santa Fe to short-haul itself. Now, the Court said there:

> "We have no occasion to consider the issue of fact [fol. 158] whether there was in existence when the Santa Fe filed its proposed tariff a through route from Dodge City via the Kansas City Southern, nor need we consider the issue whether if there was such a line in existence the Commission would be powerless by reason of Section 15, paragraph 4, to prevent Santa Fe's withdrawal from it for we are of the opinion that although the Santa Fe brought the grain into Kansas City there is nothing in the situation which precluded the Commission from cancelling the Santa Fe's proposed tariff as being unreasonable".

If Your Honors please, that is not quoted in my brief, but that quotation is taken from 279 US 768, at 775 and 776. Then there are just two other brief quotations which I would like to call your attention to from that same decision. The Court also made these following statements which appear pertinent to the issue here:

> "But the grain with which the carriers are here concerned is not that so shipped from Dodge City to the Gulf, it is grain whose only destination when shipped from Dodge City was Kansas City".

Now, that is on page 780 of that decision; and this other [fol. 159] short quotation:

> "The grain while in storage at Kansas City is in every sense free grain, when delivered to elevators in Kansas City, the Santa Fe's charges for the carriage to Kansas City were fully paid. Its legal interest therein ended then".

That is the end of the quotation.

Now, the Santa Fe case would be similar to a complaint case attacking the rates on grain and grain products from these Kansas origins to Concordia, Kansas, but which was not done. We, however, would not question the power of the Commission to pass upon the reasonableness of those rates if propertly assailed and proven to be unreasonable. Neither would we question the power of the Commission to pass upon reasonableness of the rates on grain and grain products from Concordia, Kansas to Omaha, Nebraska, over the route of the Burlington if properly complained of and proven to be unreasonable. We do, however, challenge the right and power of the Commission to pass upon the reasonableness of the through rates, through charges rather from the Kansas origins to Omaha, Nebraska, composed of the local rate of the Missouri Pacific from the Kansas origins to Concordia, thence the rate of the Burlington beyond to Omaha, in the absence of a through route from [fol. 160] the Kansas origins to Omaha in connection with these two lines via Concordia.

Now, the Interstate Commerce Commission also relies upon the decision by the United States Supreme Court in the Virginian Railway Company versus United States, 272 US 658. I do not think I need to dwell upon that case. It is not applicable. I pointed it out in my brief, but there there was a through route in existence. Here there is no through route. Now, you just cannot apply the Virginian case where there was a through route in existence to a case where there was no through route in existence. Now, I do not think I need to say anything more about that Virginian case.

Judge Sanborn: Mr. Ware, may I ask you this?

Mr. Ware: Yes.

Judge Sanborn: Suppose you were offered a carload of grain at Lenora to be shipped to Omaha via the Burlington through Concordia. Would that move on through bill of lading, or would it just go to Concordia and then the Burlington take it?

Mr. Ware: It would not move on a through billing. We would not accept a through billing on that shipment from Lenora to Omaha, because there is no through route. Now, it could move this way: it could be billed from Lenora over Missouri Pacific to Concordia in care of the Burlington. [fol. 161] We would haul it to Concordia and there we would deliver it to the Burlington, and then it would have to be rebilled over the Burlington to Omaha, Nebraska.

Judge Sanborn: So you accept no carload commodities from Lenora to Omaha via the Burlington on a through bill?

Mr. Ware: We do not. ~~That~~ is right.

Judge Hulen: What is the difference in time on the route through Atchison and the Burlington?

Mr. Ware: If the Court please, I can answer your question generally, and I can specifically if I have an opportunity to look at the brief; but if Your Honor please, the service over the Santa Fe and, as I believe—I would like to check this—but the service over the Missouri Pacific, Kansas origins to Omaha, is quicker service than over the route of the Burlington.

Now, the Burlington has three lines from Concordia to Omaha. One is via Wymore, Creek and Lincoln, and then Omaha. That is the shortest. And the distance over that line is 198 miles from Concordia to Omaha. Then it has a second line from Concordia via Table Rock and then north to Lincoln and then to Omaha. The distance over that route is 237 miles; and then it has another route via Napier, and Napier is down in here somewhere, and then north to Omaha. Now, [fol. 162] the longest route of the Burlington, and its best service route, and I think the record or Exhibit 32 before the Commission shows that the time over that route would be 22 hours and 5 minutes over the Burlington. Now, these times are just measured from Concordia, and I think the record before the Commission, I am quite sure of this, but as I say I would like to verify it, I think the time of the service over the Missouri Pacific is even better than over the Burlington. Now, while our route is a little longer, and I think our route from Concordia to Omaha is 47 miles greater than the longest route of the Burlington via Napier, but yet I say that the time consumed in transporting the shipment over the Missouri Pacific is less than it would be if it were given to the Burlington.

Judge Sanborn: What is the distance between Atchison and Kansas City, Mr. Ware? That is just a matter of curiosity.

Mr. Ware: It is about 50 or 60 miles.

Judge Sanborn: It is not important.

Mr. Ware: I think that is about it, 50 or 60 miles.

Judge Hulen: Did the Commission make any finding, your route was unreasonably long compared with the other routes?

Mr. Ware: No sir. If Your Honor please, they did not; and that is the only reason why I did not go into that feature here because—I think that that would be material [fol.163] if——

Judge Hulen: It is not in the case?

Mr. Ware: It is not in the case. It would be material if they were deciding this case, if the Commission was acting under Section 15(3 or 4), but under Section 1(3) it is not material.

Now, the plaintiff here—this is my conclusion and my prayer—that plaintiff submits that there is no evidence of record in this case to support the finding or assumption by the Commission that a through route exists from the Kansas origins involved to Omaha, Nebraska, over the lines of the Missouri Pacific and Burlington through Concordia.

Absent such a through route the Commission is without power to prescribe a through rate over those lines.

The Commission's order of July 10, 1950, should be enjoined, set aside on the ground that it is not supported by the evidence of record and is, therefore, unlawful.

I thank Your Honors.

[fol. 164] STATEMENT OF WILLIAM J. HICKEY

Mr. Hickey: May it please the Court, my name is William J. Hickey, and I am appearing on behalf of the United States.

Some of the questions from the bench have indicated an interest in why Omaha has a desire to obtain grain shipments from the points involved in this proceeding and located on the plaintiff's central branch.

Now, these points, all located solely on the plaintiff's central branch are important origin points of grain, and grain grown in Central Kansas, which has a high protein value, valuable to the millers at Omaha for blending purposes.

Now, there was a question or a statement as to the movement of this grain, and the statement was made that none of it has moved over this route which is quite understandable from the standpoint that Kansas City, a primary market, but I will not concede the fact that it is a natural market, it may have devolved to be the natural market by reason of the higher rates to Omaha, but both points are milling centers for about 95 percent of the grain they receive for transshipment out as grain or grain products to principal eastern markets.

Now, it has been shown clearly that the rate from Lenora, for instance, over the single line route of the Missouri Pacific to Omaha is 25½ cents. That is the single line route. Now, that shipment would travel a distance of ap-[fol. 165]proximately 450 miles for 25½ cents. Now, a shipment from Lenora to Kansas City going over the Central Branch to Atchison, and then south would travel a distance of 336 miles and there is a rate of 19 cents. Now the 25½ cents rate results from the fact that Atchison takes the same rate as Kansas City from these origin points, plus the fact that there is a 6 cents or 6½ cents differential tacked on to shipments north to Kansas City or Atchison, to Omaha. It is understandable that Omaha cannot compete with Kansas City on movements of grain or grain products east when they have to pay 25½ cents for this shipment Kansas City pays 19 cents. Now, the distance over that route is greater, as I said, over the single line route of the Missouri Pacific to Omaha, it would move 450 miles approximately and to Kansas City approximately 336.

Judge Moore: How much to Kansas City?

Mr. Hickey: 336.

However, the route from Lenora to Concordia and thence Burlington to Omaha, or any other representative point, may we choose Lenora as a representative point for discussion, is 5 miles shorter than the distance to Kansas City in each instance, but the rate that devolves by way of the combination local rate into Concordia and local rate Concordia, Burlington to Omaha, is 30 cents.

Now, I believe that no shipment has moved. The record [fol. 166] in this case will show that competition in flour, for instance, will turn on a fraction of a cent a barrel or 180 pounds. If Omaha has to pay 6 or more cents per 100 pounds for the grain that comes in admittedly they can't ship over this line, they can't buy any of this grain if they desired, and it was that sole reason that prompted Omaha Grain Exchange to come in and attempt to be put on a more competitive level with an equal permanent market at Kansas City, to enable them to receive and process grain from this area, grain that is highly desired and needed for blending purposes for later reshipment.

Now, it is very conceivable the Court may be a little confused as to how this case proceeded before the Commission. It is not too clear to me either. It seems at the outset that the original parties and the counsel pretty well fired a broad shot at the Commission and said, "We want to solve this situation". They did not necessarily indicate whether they regard it as a route question or rate question. They wanted an answer. There is testimony that covers both situations. As a matter of fact, although plaintiff has not stated it, the original Examiner's report in this instance recommended dismissal of the complaint treating it solely as a route case. The Commission, Division 2, in its later review, came out strongly for the view that it was not a [fol. 167] route but it was a rate case, and proceeded along the lines of the authorities discussed by the plaintiffs, holding that where the route existed they had the power to correct the rates if they were unreasonable.

But there is a good part of evidence in the record to show that it was regarded mainly as a rate case, even though there is a lot of evidence ~~on the~~ route question. Page 7 of the transcript is a statement at the opening of the proceeding before the Commission by the Examiner, in which he states his understanding of the issue before the Commission. All parties were present at the time and no exception was taken to that statement. I might read it to you. It is very short. The Examiner states:

> "I will read for your approval a brief of the issue as I understand it. It is alleged that the rates on grain and grain products from points in Kansas on the Missouri Pacific Railroad, Concordia and west thereof, applicable over that railroad to Concordia, thence Chicago, Burlington and Quincy Railroad to Omaha, Nebraska, and Council Bluffs, Iowa, are unreasonable and unduly prejudicial. The prayer is for just and equitable rates for the future."

That was the statement of the issue; a rate question pure [fol. 168] and simple adding to the twist the case took before the Commission are various statements made in the pleadings filed by the plaintiff here. They do not form part of the record that was submitted in evidence this morning. I am referring to the petitions for reconsideration filed by the plaintiff after the entry of the original division order of the Commission and after the entry of the order by the entire Commission.

Now, it was not perhaps stated, but the Examiner entered the report and in the normal way exceptions and briefs were filed, and the Commission or one of its divisions, in this case Division 2, entered an order which it held in the same way that the last order did, that the rates should be made to conform with Kansas City rates. A petition for reconsideration was filed to that order, was filed by the plaintiff and other intervening defendants in the proceeding, and the Commission reopened the proceeding on the record then established, and then the entire Commission entered its order which is recorded in 278, and which is referred to, July 10, 1950 order.

There are two reports and they are attached to plaintiff's complaint, but in each instance the Commission and its division found that the rates should be made to conform with the Kansas City rates. There is not a great deal of consideration, if any, by the Commission in its reports as to the [fol. 169] existence of this through route.

Plaintiff's counsel is correct when he says that there was a finding on an assumption. Practically, there is an assumption, but I believe that the assumption is warranted. From a review of Plaintiff's consideration of the case, when he filed its original petition for reconsideration with the Commission, that was after the Division 2 order.

Now, in summarizing the issues in the first part of its petition it says the route over which the rates are assailed is not a published tariff route. It is closed to all intents and purposes by reason of the fact that the rates applicable over said route are made a combination of locals over Concordia and are higher than the through rate over the single line route Missouri Pacific. Now, every fact in that statement is correct. They are higher. It is closed for all intents and purposes because no one can afford to pay those high rates; but it does not state that there is no route. It says it is a closed route, commercially closed route, and that is the treatment that plaintiff gave the case in its petition.

Now, in support of that summary statement, on page 9 of its petition plaintiff says the grain traffic may be routed from the origin territory involved to Omaha in connection with the Burlington at Concordia, but a combination of [fol. 170] rates made over Concordia composed of the Missouri Pacific flat rate to Concordia and Burlington's flat-rate beyond to Omaha would apply. The combination rate made over Concordia is higher than the rate over the single line route of the Missouri Pacific, made a combination over Atchison. The Concordia route is closed to all intents and purposes by reason of the fact that the higher combination of rates applies over that route. It is not a published tariff route on grain and grain products, all to the intents and purposes again, that the route while existing has not by the voluntary act of the plaintiff been opened, commercially opened, because of the fact that it would lose a major portion of its haul to Omaha, but it still does not go to the question as to the existence of a through route.

Now, the Commission a long while ago had to deal with the question of through routes, through rates. In one of their early reports, set out in 12 I. C. C. 163, rendered in 1907, entitled "through routes and through rates", at page 166 the Commission says a through route is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a joint rate. It may be merely an aggregation of separate rates fixed independently by the [fol. 171] several carriers performing the through route, as where the through rate is the sum of the locals on the several connecting lines, or is the sum of lower rates otherwise separately established by them for through transportation.

Now, that report is quite a lengthy one, and I have not attempted, possibly cannot even in brief summarize all the holdings and all the examples that the Commission gives, but they discuss a number of proceedings in which they explore all the ramifications of this question, sort of an academic question, does a through route exist.

Counsel for plaintiff says a physical connection does not establish the through route, and I am inclined to agree with him, a physical track connection alone does not. But this Court has to decide, as the Commission did, do all the instances surrounding this movement, or possible movement —it is a fact that it could not move, it has not moved because of prohibitive rates, but a possible movement, would it be a through movement?

Now, plaintiff's counsel has said a through rate implies a through route. That follows the Commission's decision just cited. Is there a through rate?

Judge Sanborn asked the question, would there be a through bill of lading honored by the Missouri Pacific, and the answer was no. But I disagree. Of course, the question [fol. 172] really raises the issue in the case. If the through bill of lading would be honored there is a through route, and the Commission admittedly, as plaintiff concedes, has the power to prescribe the reasonable rate over the through route, be it a combination of locals such as exist here; but granted the existence of connections and a rate published and available, we believe that a through route exists and would move at that rate.

Now, there is too much discussion in the report as to the rate, and the fact it is so high as to prohibit shipments, and so forth, from these origin points to Omaha, to say that there is no applicable rate for through movement. Now, there is the physical track connection. Well that also may not, standing alone, but in conjunction with other facts so far as the intent and implied arrangement for through carriage. Partially, in support of the evidence of record to support an implied or express arrangement for through traffic, is this existence admitted by the plaintiff's witness before the Commission of the track arrangement and interchange arrangements between the plaintiff and the Burlington at Concordia.

Now, I believe it is on page 87 of the record, plaintiff's only operating witness [illegible]ified as to its operations through this area. Now, in the course of his testimony he stated that Concordia was a division point, and by that exploration by the Examiner at the hearing, it was stated that all local [fol. 173] traffic from the origin points in this area west of Concordia stops at Concordia, is re-assembled, will either move eastward over the Central Branch to Atchison in so-called expedited Red Ball Service, fast service, but all crews, cars and local traffic of the Missouri Pacific is broken down at Concordia. Switching arrangements are maintained at Concordia; traffic, as the witness stated, destined for local use is spotted on spur tracks. Traffic destined for connections, and there the witness says three railroads, other railroads, operate into Concordia, are switched over to the connections, cars destined for these connections.

Now, the official register of interchange, and official guide published in conjunction with the Commission, shows the Missouri Pacific reporting Concordia as an interchange point with the Union Pacific, the Santa Fe and the Burlington. Now, those routes do not show on this map, that is other than the Burlington. The U. P., and Santa Fe, come in with routes from the south.

In addition, Agent Kipp, an agent for the Missouri Pacific, has published class rates applicable on through shipments from origin points on Central Branch to points including Omaha on the Burlington. Now, plaintiff's counsel might quarrel with the fact that I cite that instance. It is an official publication of the railroad. It is filed by regula- [fol. 174] tion with the Commission. It is in compliance with Section 6 of the Interstate Commerce Act whereby they have to publish the applicable rates over these routes. It is something the Commission could take notice of, something this Court could take notice of. The fact that it is not set forth in the report in specific detail as to each and every consideration making up this through route does not deny the existence of the route, I have earlier indicated, partially because of the fact that there was no direct statement that no other route was in existence, but that it was commercially closed.

Judge Moore: Pardon me. May I ask a question?

Mr. Hickey: Yes.

Judge Moore: About this publication, about this agent for the Missouri Pacific, was it?

Mr. Hickey: Yes sir, it is a general freight agent.

Judge Moore: Is that put out as his own, or is that put out as the Missouri Pacific?

Mr. Hickey: That is put out as Missouri Pacific and a number of other railroads operating in the area. It is a joint publication by this agent on behalf of all the carriers.

Judge Moore: It just shows what the rates would be to various places over the Missouri Pacific and other connect- [fol. 175] ing railroads?

Mr. Hickey: Not specifically. It does not name point to point in this area, which is commonly referred to as Western Trunk Line Territory. There are class rates made up of group rates. Now, an area up here would be in one group, an area down here would be in another group. Now, there are rates applicable between points in those groups. They are not named, for instance, from Lincoln to Omaha.

Judge Moore: Are you citing that as evidence of the establishment of the route?

Mr. Hickey: I am citing that as evidence of the establishment and publication of a through rate which the carrier, the originating carrier, in this instance the Missouri Pacific, would be obliged to use and to ship to such points served by the Burlington through Concordia. In other words, I am stating that the physical connection for the route exists. The track is there. The arrangement is indicated by the evidence of record. The switching occurs. There is a rate that is applicable. I say, then I conclude there is no hindrance. What more could we look for or would a shipper look for to guide him as to whether he could route a shipment that way? He could look for perhaps an express prohibition against such a route, but he would not find it.
[fol. 176] Judge Hulen: What effect would that publication have on the issuance of a through bill of lading?

Mr. Hickey: I think then it would open the way for recovery of damages on the part of the shipper because of the violation by the carrier of the Interstate Commerce Act, the refusal to ship on a prescribed possible routing at a published rate. They are required not only to publish reasonable rates, they are also required to ship in accordance and abide by those rules and regulations and all rules and regulations governing those rates.

Now, I will just discuss briefly the situation in the Virginian Railway case. Plaintiff's counsel says there the Supreme Court stated that a through route existed, and inasmuch as a through route does not exist in this case nothing need be said about the Virginian case. But if you will read all the facts as stated by the Supreme Court it will show the same situation, such as this, that on the lines of the Virginian there were certain mines, from which through routes, through rates to the west were maintained by the Virginian in connection with western lines at other points along the same railroad line, and we have to assume a connection here, and the Virginian operating eastward to Norfolk, with points over here, those two rates were not made applicable by the Virginian, and for shipments to the west they would be assessed a local charge from this point [fol. 177] to the junction point, and then a local flat rate from there on out.

Now, the court found that a through route existed. The charge was similar as in this case, no through route exists here, and no joint rate, no agreement by the carriers to participate in this traffic. Admittedly, it was the desire of the Virginian to take its long-haul over its single line routing eastward rather than send it westward for perhaps 50 or 60 miles and then let another carrier take it from that point on.

On that basis, that they were operating, that there was a railroad line operated by the Virginian through certain mines at which joint rates were applicable, continuing on to other lines where there was no joint rate applicable, the court found that a through routing existed independent of such allocation that it did not, and combination of rates, and said that the through rate was the combination of locals. Now, that is just as the Commission said in this case, a through route exists in connection with that, and the rate is the combination of locals following that decision.

Now, there has been a fairly recent decision following the Virginian case. It involved grain. It is the Great Northern Railroad against U.S. It was decided by a three-judge district court in Wilmington, Delaware, approxi- [fol. 178] mately two years ago. Now, the case was a little different—I won't take up too much time of the Court. Briefly the situation is this: the Great Northern had a long single line route out to Seattle, Washington, and down into California, an 1100-mile haul. The area involved was so-called Montana Triangle, where wheat of desirable quality was obtained for mills located all throughout this area. There was a route via the Great Northern to Butte, Montana, and then the U.P. into California, the same destination area, over this route was approximately a 200-mile direct line. Great Falls was an intermediate point on both routes.

Transit. Now, I don't want to confuse this. I think the Court understands. Briefly described, transit which might involve storage, manufacture or change into product at a certain point on a route is a privilege so that the grain moving over that might be stopped, the change made, storage made and moved later as if it never stopped at all. In other words, it takes a through rate. Now, transit was permitted at Great Falls by the Great Northern over its route west, but was not permitted east, so that under its applicable terms these shippers and the mills at Great Falls would have to pay a local inbound rate, because it was stopped without a transit privilege, and then the other balance of the rate out, which rate was greatly in excess of [fol. 179] the rate out this way. Now, the Commission in that case said the route exists, there is a combination of rates applicable into Great Falls and out. We are going to and we have the power to prescribe reasonable regulations as well as reasonable rates over through routes, and we will in this instance direct that transit be accorded.

Now, the quarrel of Great Northern with that was it short-hauled them, it took away their 1100-mile haul because, if given the privilege it takes the through rate, it goes 200 miles, and goes to connecting traffic, but it was affirmed in 1949 or 1950 by the Supreme Court, and it was in practical reliance on the two cases that the Commission cites here, the Santa Fe case, 279 U. S., and the Virginian case in 272 U. S.

I do not think I have eliminated anything. I have attempted to show basically that there is some evidence, perhaps not of the content that I would like at this time, or the Court might desire, but at least some evidence in the report, some basis for the Commission to find that there was an arrangement, express or implied, between the Burlington and the plaintiff whereby a shipment could be made from these origin points to Omaha; that there was an applicable rate to such shipment; that such shipment would move as a through movement and as such was a movement [fol. 180] over a through route.

Judge Sanborn: Mr. Hickey, do you agree with Mr. Ware that the only issue in this case is whether there was or was not a through route?

Mr. Hickey: That is the sole issue as plaintiff has made his case. I am not going to enlarge on plaintiff's case. I am simply going to answer, that is the question, is there any basis in fact or law for the Commission to assume or find the existence of a through route, and he has conceded that if there is a through route the case is out, because he does not attack the reasonableness of the application of rates similar to those to Kansas City over this route.

Judge Sanborn: Your position is that if we should find there was no through route, or at least the Commission had no authority to find that there was no through route, why then we grant the relief Mr. Ware asks?

Mr. Hickey: The Court asked me that same question in the Great Northern case I was just describing, about three years ago, and I hedged on it; but I have since thought over that, and I will have to say yes, Your Honor, if you so find we are out. I think the case was a little different in that instance.

Judge Sanborn: Mr. Hickey, would this be fair statement: the Commission takes the position that if there is a route [fol. 181] over two carriers which is feasible and practical, and where there are physical connections, it at least has the power to determine that that physically is a reasonable route and to order a through rate? Is that about the position that they take?

Mr. Hickey: That the Commission takes?

Judge Sanborn: Yes.

Mr. Hickey: I think they go a little beyond that, Your Honor, that the possibility, and they again relate it, I think primarily or solely to the physical connection.

Judge Sanborn: I would say physical connection plus, that is assuming the physical connection makes a feasible and reasonable route from the point of origin to point of destination. Now, as I read that Great Northern case, I think I have only a very remote recollection, but there the Great Northern took substantially the same position the Missouri Pacific does here. It said that there was no through route such as the Commission found that there was, because it had been granted that transit privilege, which indicated it was in fact a through route, a two-way through route.

Mr. Hickey: That is right.

Judge Sanborn: And that the Commission overruled, and the Court overruled, and the Supreme Court overruled.

[fol. 182] Mr. Hickey: That is right. There was only one additional point in the Great Northern case that assisted our presentation, and that was that there was a discussion in the early grain case which gave rise to the rates over the routes, a discussion of the route from the triangle via Butte to the destination area. Now, to the extent that that persuaded the court that there was a route there, and the way we argued that there was a route there, you can weigh.

But the contention was that even though there was a route there, it was not an approved route because of the rate situation insofar as Great Falls was concerned. There was no quarrel that to the miller at Butte there was a through route as to him; but as to the Great Falls miller there was no through route because the combination applied. It is very close to the situation we have here, very close.

Judge Hulen: This question up for discussion now really goes to whether the Commission could act under Section 15(4), but as I understand it they did not act in this case under that section, but assumed that there was a through route, is that correct?

Mr. Hickey: Well, Judge Sanborn's question was somewhere in between, it was not a question of prescribing a through route, I think, as I understand under his question.

[fol. 183] Judge Hulen: Well, did the Commission assume there was a through route, or did they concede under Section 15(4) they could find a basis to prescribe?

Mr. Hickey: Oh no. They assumed the existence or found the existence of a through route.

Judge Hulen: And your position is based upon that assumption, and under this arrangement by Mr. Kipp, and the fact that there is a physical connection, and the fact that there is a shorter route?

Mr. Hickey: The fact that there are interchange arrangements, and then I would disregard, or urge the Court to disregard the absence of movements, because that is a commercial matter, because no one is going to do any shipping under that prohibitive rate, just to see if they could test that movement. It is could it move, not did it.

Judge Hulen: How long has that Kipp arrangement been in effect?

Mr. Hickey: I think that has been out quite some time. You are familiar with that.

Mr. Ware: Yes. Mr. Kipp is a general agent for a group of carriers, Western Trunk Line Agent and publishes tariffs for them.

Mr. Hickey: You might have more to say about that.

[fol. 184] Mr. Ware: Yes, I would like to.

Judge Hulen: Is that in the record in the case?

Mr. Hickey: Is that in the record?

Judge Hulen: I mean the record as tried, the record as made.

Mr. Hickey: The record as made.

Judge Hulen: Does the Commission refer to it in the opinion?

Mr. Hickey: No sir, it does not. That is something we looked up to see.

Judge Hulen: It is not a basis of the order?

Mr. Hickey: The Commission did not base its order on an alleged controversy as to the existence of the through route, and that is what we attempted to show earlier. There was no quarrel as to its legal existence.

Judge Hulen: Your position is that it was tried on the theory there was a through route?

Mr. Hickey: That is my position, and as pictured by the plaintiff in its petition for reconsideration, not that it was not legally there, but that it was not commercially available; and the fact, as he argued, to make it commercially available violates Section 15(3 and 4), which the Virginian case says not, and the Atchison, Topeka case says not, and which was conceded by the plaintiff. That is the basis of the issue. Is it or is it not there.

[fol. 185] Thank you very much.

Statement of Samuel R. Howell

Mr. Howell: May it please the Court. I represent the Interstate Commerce Commission whose order is here under attack.

Mr. Ware, plaintiff's counsel, has said that the only question involved in this case is whether or not there was a through route between the points on his railroad line and the Burlington to Omaha by way of Concordia; and my colleague has agreed with him, I believe on some of that; but I do not agree with that, if the Court please. The Commission does not agree with that.

Now, true the question whether or not there is a through route is an important question, I think it is one question, but then there is another question, whether or not the Commission has authority even though there was not a through route, to prescribe a reasonable rate, and certainly the

Commission found here and on the record, it could not do anything else but find, that the rate published by the Missouri Pacific of 14 cents from Lenora, Kansas to Concordia, and the Burlington rate of 16 cents from Concordia to Omaha, making a total of 30 cents is an unreasonable rate as compared with a 19 cent rate established by the Missouri Pacific from Lenora, Kansas by way of Concordia, [fol. 186] which is 5 miles farther to Kansas City than to Omaha, so viewed with relation to those rates it is certainly perfectly obvious that the rate over the Concordia route is unreasonable. Now, then, as I say, the main question is whether or not aside from this other question, did a through route exist because if one existed that would solve the problem, Your Honors would have no further difficulty because then Mr. Ware would be out.

But assuming that there is no through route, then does the Commission have the authority to establish or to prescribe reasonable rates, a combination of rates over this route in the public interest.

Now, Mr. Justice Brandeis said in the Santa Fe case that the Commission had such authority, and Justice Brandeis said that the broad power of the Commission which was given to it by Congress in the Act of 1887, to prescribe reasonable rates, has not in any way been limited by any amendatory Act of Congress or by any interpretation of the Supreme Court, or the courts in construing that authority, or by any decision of the Commission itself; and I would like to say, too, ~~Your~~ Honors, that the Commission has since the decision of Justice Brandeis in that Santa Fe case, uniformly held that its power is not limited or restricted by the short-hauling provisions of Section 15, as my adversary would have you believe, that that is paramount, [fol. 187] mount, I mean the short-hauling section, because the right of the Commission to prescribe a reasonable rate was given to the Commission by Congress in the original Act, and as Justice Brandeis said, much legislation has been enacted since that time strengthening the Commission's power and its authority to enforce that right.

Now, I do not believe Your Honors are going to say that the Commission does not have the power to prescribe as reasonable a rate over this short route from Lenora, Kansas on the Missouri Pacific Line through Concordia to Omaha, Nebraska, on the Burlington Line. That line is 113 miles shorter than the line by way of Atchison and up the river then to Omaha.

Now, I do not believe Your Honors are going to permit the technical construction of one section of the act to nullify the provisions of another section which clearly Congress intended that the Commission should enforce, and there is no question but what that is the paramount provision of the statute and the Commission so construes it, and so considers it.

Now, I do not think that the Court will protect the Missouri Pacific's long-haul. I do not think the Court should in this case, which gives it 25½ cents, or a differential of 6½ cents more for hauling this grain around by Robin [fol. 188] Hood's barn and up to Omaha; and Mr. Ware says, "Well, we are justified in doing that because of the distance". Now, if that argument were followed, why the further away that a carrier had to haul grain or haul traffic around to get it to its consignee, the more it could charge for it; and the Commission has never considered such a basis of rates as a reasonable proposition, and, of course, it certainly could not justify it, on the ground that it would be bad economics for the carrier if they did not give it to them. That is not the way the Commission prescribes these rates.

The Commission prescribed rates, if the Court please, in the grain rate investigation, and it prescribed the rates that made up a structure or a scale of rates for the west, and it took years to do that, and in that scale of rates and in its findings and conclusions, the Commission said that the rates from farm to market on grain, or that the rates to the key points, or the rate break points in accordance with the structure we have set up here, will be about 91 percent of the structure, of course considering 100 percent as the maximum, 91 percent of the grain rate structure.

Now, the Missouri Pacific used that scale and constructed a rate from Lenora, Kansas, to Kansas City of 19 cents, and a distance which is, I think 5 miles farther than over the Concordia route, to Omaha, by the Burlington.

[fol. 189] Now, the Commission found in this case that the rate of 19 cents which they said—they did not say the rate, but they said the rate over this combination route by the Missouri Pacific and Burlington is unreasonable to the extent that it exceeds the 19 cent rate which the Missouri Pacific established down from Lenora to Kansas City. So in making that finding, if the Court please, the Commission was squaring its finding there with its decision in these Western grain rate cases, and Mr. Ware knows that, too. He knows that his rate from Lenora, Kansas, to Kansas City is based on the prescription of the Commission in the grain rate case. He knows and the Missouri Pacific knows that this rate of 25½ cents from Lenora, Kansas to Atchison up to Omaha, is in violation of the prescriptions in the grain rate case, because those rates were based upon short line distances and not upon these circuitous routes. Why, if the Court please, the Commission's report shows by hauling this grain around by Atchison and up the river, a distance of 113 miles farther than it would be over this short line route, that in doing that the structure, the amount of structure involved there ranged from 33⅓ percent to 57 percent, and that is too much, because the Commission would never prescribe a rate like that. So when counsel for plaintiff says in his brief here, which he does say, that the [fol. 190] rate of 25½ cents, the 25½ cent rate from Lenora, Kansas to Omaha, Nebraska, by way of St. Joseph and by way of Atchison is a Commission-prescribed rate, he is in error about that, and I think he will want to revise that statement because that is not right. From the investigation that I made that is not right, and I would like him to show me where he is right when he says the Commission prescribed this rate of 25½ cents.

But not, the fact is that Omaha grain exchange is precluded, it is cut off absolutely from a very important grain producing and grain shipping area in Kansas because the Missouri Pacific Railroad tries to dictate to the shippers and grain merchants and milling interests where it can buy its grain. Now, that is exactly what it amounts to. We do not think Your Honors are going to set aside this Commission's order, which would preclude that thing from happening.

Now, the railroads, of course, are to be considered in fixing their rates, but the public also is entitled to consideration, and the Commission attempts to protect the interests of the carriers as well as the public. It has the interest of the public at heart, and Your Honors will also.

Now, as I say, Mr. Justice Brandeis, in the Santa Fe case, has held that the Commission's authority under Section 1 to prescribe reasonable rates is paramount to this short-hauling provision.

[fol. 191] Now, as I said a while ago, the Commission in all of its decisions since Justice Brandeis' pronouncement in the Santa Fe case has uniformly construed the Act that it was not bound by the short-hauling provisions when it was called upon to decide the reasonableness of a rate.

Now, adversary counsel cited a number of Commission decisions which go the other way, but those, if the Court please, when you look at his brief and compare the date of the decisions are all prior to the decision of Justice Brandeis in the Santa Fe case. At times the Commission may have been inconsistent in its holding, but since the Brandeis decision the Commission has been consistent in its findings, and we think that that certainly would make for equity and fairness, and it is right.

I had planned to discuss the question whether or not a through route existed, but somehow or other I got over on to this other thing, but I want now to say a few words——

Judge Sanborn: Just let me ask you this: your contention is, as I understand it, whether there was through route or not, or whether the evidence is sufficient to support the finding of the Commission that there was a through route, nevertheless the Commission had the right to prescribe as reasonable rates over the Concordia route?

Mr. Howell: Yes, that is right.

[fol. 192] Now, Mr. Ware cites, I think the Missouri Pacific case, United States vs. Missouri Pacific Railroad, 278 U. S., which was decided a short time before the Santa Fe case, in which the Supreme Court held the other way, but the Santa Fe reversed that decision in U. S. vs. Chicago, Rock Island, in 278 I. C. C.

Now, as I say, we do not have to rely on the Santa Fe case here, because I think there is an abundance of evidence in the record to show, sufficient evidence to show the existence of a through route—I will be fair about this, there is sufficient evidence in the record, to show the existence of a through route; and if there is a through route I say this other argument would not follow. If Your Honors should find that there is a through route, as the Commission has found, then, of course, that would resolve the issue in favor of the Commission's order.

Now, Mr. Hickey has given Your Honors, I think, an outline of the evidence which the Commission had before it in making up its mind that there was such a through route. First, as he pointed out, there was testimony of witnesses, and one of those witnesses was the witness of the plaintiff in this case. He testified that there was at Concordia facilities for interchange of traffic, and he testified as to the train schedules, and all of those things; and I think that testimony was based upon the practical experience he had [fol. 193] had in seeing that cars were switched over from the Missouri Pacific, which originated west of Concordia, over the Burlington to points at Omaha and points which may be short of Omaha.

Now, then, Mr. Kuhn, who represented the Omaha Grain Exchange, and who I believe has passed on since that time, was the principal witness for the Omaha Grain Exchange, and he said when he testified at the Commission hearing—"We have a through route between the Missouri Pacific and the Burlington, which is the reasonable short route, and all we are asking for is that the Commission prescribe a reasonable rate over that route, that Omaha is cut off from receiving any grain out on the Missouri Pacific line because of this prohibitive rate of 30 cents per 100 pounds when our competitive market of Kansas City gets a rate of 19 cents, 11 cents less, and it is 5 miles further to Kansas City than it is to Omaha". That was his view of the situation. It was not his view, as Mr. Ware has said here, that he was invoking Section 15 in order to get a through route. He mentioned Section 15 for fear maybe the Commission would not know, would not think it could do it under Section 15; but the Commission could do it under Section 15, but it said, "We do not have to because there is a through route", and the only thing in the world that keeps it from being an effective through route for grain is the fact that it is closed [fol. 194] because of this prohibitive rate, which Mr. Ware admits in his brief, that they made the rate so high as to pervent any grain from moving over the Burlington and permitting the Missouri Pacific to retain that traffic to itself at the expense of denying to Omaha a market down there, and also at the expense of denying to the public equitable and fair and just rates on their products.

Judge Hulen: Let me ask you a question. Is there any evidence of the shipment of grain over this route?

Mr. Howell: There is no evidence in the record, no specific evidence that any grain moved over this route, that is, no bills of lading, because I think Mr. Ware told Your Honors, and rightly, you won't find any bills of lading, where they have billed wheat over this Concordia route, any through bills of lading to Omaha, because they would not dare do that, because they would then be showing that there was a through route, see, but they can't deny the existence of a through route just because they would refuse to issue a through bill of lading. I suppose they would be arbitrary enough not to issue a through bill of lading on a car, not only of wheat or of feed, but of anything else that originated out in that western branch, central branch line, to a shipper. If a shipper said, "I want to haul this to Omaha", they would say, "We won't issue a through bill of lading. We will issue it only to Concordia and the Burlington will [fol. 195] have to issue it from there on". But that would not, I think, mean that there is no through route, because nothing was introduced into the testimony that through billings were made.

But this is the thing I was coming to, if the Court please, that the Commission—of course, that testimony was not presented because it was not thought at the time by the applicant before the Commission that this was anything more than a rate case, the prescription of a reasonable rate, and, of course, they did not present that sort of evidence; and we are not here saying that the Commission could rely on any rumors it had or anything, but the Commission did have before it these rate publications which were published for the Missouri Pacific and the Burlington, and the Chicago Northwestern, and the Rock Island, and the Union Pacific, and all of them, they did have the rates, joint class rates which Mr. Ware's client and which the Burlington had issued, showing that they would move—these were joint class rates—that they would move traffic over the Missouri Pacific and the Burlington to points on the Burlington not served by the Union Pacific, I mean not served by the Missouri Pacific. But those rates did not go all the way to Omaha. They were rates, joint class rates, if the Court please, published by the Missouri Pacific and the Burlington on traffic originating on the Missouri Pacific [fol. 196] Line destined to points on the Burlington, up to Omaha—not Omaha specifically but, points intermediate Concordia and Omaha; and we insist that would make evidence of a joint through route. Now, that would certainly be strong implied evidence that those rates do carry traffic, and I am sure—of course, that does not help our case for me to say that, but it stands to reason that traffic does move from the Missouri Pacific Lines to points intermediate Concordia and Omaha on the Burlington route. It is inconceivable to think that those rates would not move traffic, because there is bound to be traffic moving. So since then the Commission has defined through routes as an arrangement between two carriers express or implied. Then it is not, of course, necessary, we think—and by the way, the Supreme Court has approved that definition, and quoted it I believe in the Virginia case, or in one of those cases, the Santa Fe or one of those cases the Supreme Court has decided—so then the Commission would be justified in finding, I mean by implication, implication of law, that there is a through route. It did not find, of course, an express agreement, like an express contract; but just as there can be express contracts and implied contracts, or contracts implied by law, there can, of course, be arrangements the same way, the Commission said; and so we insist that there was sufficient evidence in the record to justify [fol. 197] the Commission's finding that there was an open through route, and that there were class rates. And by the way, in that connection, if the Court ~~please, there is~~ a case which I have cited in my brief which I will hand to Your Honors before you adjourn, where the Commission has said that through rates—it may be shown by the publication of rates or by the movement of traffic from points on the line of one railroad to a point on the line of the other railroad, or beyond that point to another point, because of the fact that traffic moved, and it said that would be true whether the carriers intended it or not. In other words, in this case here, the Omaha Grain Exchange could show that there was a through route by showing that traffic moved from the Missouri Pacific Line from Lenora to points on the Burlington short of Omaha, that it may show there was a through route to Omaha by making that showing and whether the carriers intended it or not, if they had rates or if they moved traffic.

Now, I want to save a few minutes for my colleague, Mr. Moberg, who represents the Omaha Grain Exchange, but I am afraid I have taken up all our time.

Judge Sanborn: Yes, you have. But how much time would you like, Mr. Moberg?

STATEMENT OF OSCAR J. MOBERG

Mr. Moberg: Well, Your Honor, I will stand on the statements, and adopt the statements and argument of the Com- [fol. 198] mission here and the Department of Justice. So I will waive my argument in the matter.

Mr. Howell: I am about through anyway.

Judge Sanborn: If you would like to say something, Mr. Moberg, you are welcome.

Mr. Moberg: Well, if Mr. Howell is through.

Mr. Howell: I am through. I would like to hand Your Honors this brief.

Mr. Moberg: May it please the Court, I would like to point out in the petition for reconsideration filed by the plaintiff here, in Division 2, which recommended the publication of the rates as to that Concordia route, the plaintiff here did say this in this petition: "The Concordia route is closed to all intents and purposes, by reason of the fact that the higher combination of rates apply over that route. It is not a published tariff route on grain and grain products".

Now, that will probably answer Judge Hulen's question as to whether there are any commodities that move over that route.

Now, that is all I have to say.

Mr. Howell: I intended to bring this in, that in the grain investigation case the Interstate Commerce Commission established rates, prescribed rates from a point 40 miles north of the Missouri Pacific Lines to Omaha, that is, points [fol. 199] up in Nebraska to Omaha, 2 cents less than it prescribed on the rate to Kansas City from those points, and it prescribed in that investigation, the findings in that investigation, it prescribed the rate from points 40 miles south of this central branch of the Missouri Pacific, 40 miles south of that area, a rate to Kansas City 6 cents less per 100 pounds than to Omaha, in recognition of the closer distance, you see, to Kansas City than to Omaha, and the same way around, but it did not fix any rate in this area served by the Missouri Pacific, that is 40 miles north and 40 miles south thereof. It left that territory open, but it directed that the rates made for movement of traffic in that open territory, or no man's land, be made with reasonable relation to the rates prescribed for the portion south and for the territory north, and the Missouri Pacific did make such rates. It followed the Commission's rate prescriptions in making its rate to Kansas City of 19 cents per 100 pounds, and the Commission found that the short line rate—now that was all of this whole rate basis structure was made for short line distances and not for circuitous lines—and it found that the rate by way of Concordia to Omaha should be not greater than the rate to Kansas City, and it gave recognition to its prescription in the grain case in making that rate.

Thank you, Your Honors.

[fol. 200] Judge Sanborn: Mr. Ware.

Mr. Ware: If Your Honors please, Mr. Howell in his argument has made it very clear to this Court why the Missouri Pacific and these other railroads in similar position need to come to the Court for help.

The Commission has never liked the limitations imposed upon its power by Section 15 (4) of the Interstate Commerce Act. That is why we are here; and that is why we want the Court to consider the question here involved very carefully.

Now, counsel for the Commission has talked a very great deal about the rates, the reasonableness of the rates. They do not like to recognize any limitation upon the Commission's power with respect to the prescription of through routes. Now, he talked about this rate over the Missouri Pacific being an unreasonable rate. Division 2 first decided this case, and it said, and I quote—this appears on page 21 of my complaint: "We find that the rates assailed from points on the central branch of the Missouri Pacific to Omaha and Council Bluffs are and for the future will be unreasonable to the extent that they exceed or may exceed rates on like traffic from the same origins to Kansas City"; and then they go ahead, "Entry of an order will be deferred to afford Missouri Pacific an opportunity to establish the rates herein found to be reasonable. If such rates are not [fol. 201] established within a reasonable time complainant may petition for entry of an appropriate order".

Now, the Missouri Pacific refused to voluntarily establish those rates over its line direct, and the reason we did was because we believe, and still believe, that to have done so would have been to violate an outstanding order of the Interstate Commerce Commission in the Western Grain case. Now, if the Commission had not thought so it could very well have entered an order directing the Missouri Pacific to publish those rates over its direct line, but it did not do that. It reopened this case on reconsideration, and then it required the Missouri Pacific and the Burlington to the extent that they participate in this traffic, to publish those through rates over their line on the assumption that a through route existed over those two lines from these Kansas origins to Omaha. Now, I am not talking about a through rate to any other points. I am talking about through rates from these Kansas origins to Omaha, Nebraska.

Now, Mr. Hickey and Mr. Howell have both referred to Kipp's tariff. Kipp is a publishing agent for these railroads. He publishes these class rates, but I think Mr. Howell made it clear in his argument that those class rates do not apply over the Missouri Pacific and the Burlington to these markets. There is a provision in that class rate tariff which restricts the application of those class rates over the [fol. 202] direct line of the Missouri Pacific Railroad.

Judge Sanborn: Now, were those tariffs made any part of the record in this case?

Mr. Ware: I do not recall that they are, if Your Honor please.

Judge Sanborn: How about the right of the Court to take judicial notice?

Mr. Howell: Your Honors can do that.

Mr. Ware: That would be quite all right, yes sir.

Judge Hulen: I am not sure I understand your position on that.

Mr. Ware: There is a provision in the class rate tariff, if Your Honor please, which restricts the application of those rates except to the Missouri river cities, except over the Missouri Pacific direct. It does not apply—Mr. Howell made it clear, that if they apply short of Omaha, they do not apply to Omaha.

Judge Hulen: Do they apply to other points on the Burlington short of Omaha?

Mr. Ware: They might possibly do that, yes sir.

Judge Hulen: Well, what would you say if a shipment originated on the north; some station down half way between Concordia and Omaha on the Burlington; would you issue [fol. 203] a through bill of lading on that shipment?

Mr. Ware: They might possibly do so, if Your Honor please.

Judge Hulen: Would you issue a through bill of lading on any point between Concordia, short of Omaha?

Mr. Ware: We might do that, but not Omaha.

Judge Hulen: And that would protect your shipment?

Mr. Ware: That is correct, yes sir.

Judge Hulen: Well, then, would you admit that there is a through route over these two connecting routes to all points short of Omaha?

Mr. Ware: There might possibly be to some of them, but it would be short of Omaha.

Judge Sanborn: Does the Burlington run through Lincoln?

Mr. Howell: It does.

Mr. Ware: Yes.

Judge Sanborn: And has the Missouri Pacific any line to Lincoln?

Mr. Ware: We do, yes, but it comes out the other way. If Your Honor please, on that point I have a reference here to a couple cases, and I think that might possibly bear on the point.

Judge Sanborn: Are they in the brief?

[fol. 204] Mr. Ware: No, they are not in the brief, if Your Honor please. Taking these from Aitchison's Digest of Interstate Commerce Act, annotated. It says this. I will quote it.

> "There might be through routes and joint rates on some traffic but not all traffic. In the Stuckel case, 255 I. C. C. 333, and California Milling Corporation case, 276 I. C. C. 531, the Commission did not require that the through routes and joint rates apply to all traffic merely because there was evidence which it thought justified making them available to grain used by complainants in the manufacture of mixed feeds and flour. Instead it limited its findings to the commodities about which there was testimony".

Now, if the Court please, Mr. Hickey referred to the Virginian case, the Great Northern case versus the United States, and there the Court says that those two cases are analagous, but certainly those two cases are not analagous to the facts as here before the Commission and now before the Court. Now, I have examined these reports very carefully, and I have yet to find any of those which would support the Commission's finding or assumption that a through route exists over these two lines of the Missouri Pacific—[fol. 205] Burlington via Concordia from Kansas origins to Omaha, Nebraska.

There are some points that have been raised by counsel with respect to these combination rates, and I think that I have covered it fully on my brief, and I do not think I could say anything more than to repeat what I have said in brief on those two points. I want to thank Your Honors.

Judge Sanborn: Before you get to that, Mr. Ware, what have you to say about Mr. Howell's argument to the effect even if there was not a through route the Commission had the right to establish a reasonable rate.

Mr. Ware: The Commission has no power to prescribe a through rate in the absence of a through route. Now, then, he is assuming that there is a through route from these Kansas origins to Omaha in order that the Commission could prescribe a through rate. Now, he in that argument—and that is the point that I tried to make clear when I first stood up—he makes clear why the railroads need the help of the courts in keeping the Commission in line. It does not recognize any limitations upon its power.

Now, I will say this, if the Court please, that the Commission has the power under Section 15 (3 and 4) to establish that route if the evidence of record would justify [fol. 206] it. I do not think it does. But they did not exercise the authority which they have under Section 15(3) Subject to the limitations imposed by ~~15(4).~~ It just went out and made it a rate case on the assumption that there was a through route, and that is my case. There is no through route. There is no evidence to support their assumption or finding that there is a through route between these Kansas origins and Omaha, Nebraska, over the line of the Missouri Pacific via Concordia thence Burlington.

Judge Sanborn: I take it your thought is if they wanted to regulate the local rates, they would have to regulate them as local rates and not as a combination through rate?

Mr. Ware: That is exactly right. But there is no complaint here, if Your Honor please, about this local rate over the Missouri Pacific from these origins to Concordia, Kansas; neither is there any complaint here about the local rate of the Burlington Railroad from Concordia to Omaha, Nebraska. But they would have the power to prescribe the reasonableness of those rates if they were properly assailed and the evidence warranted it.

I believe that is all I have.

Mr. Howell: If the Court please, I assume Your Honors would like to have all the information you can get on that question, the last question Judge Sanborn, you asked Mr. [fol. 207] Ware. But it is my understanding, and I checked this with the Examiner who was concerned with this case, that the Commission and the rate people back there, that the Commission in prescribing these rates as reasonable rates do not usually consider them in halves, but they consider the total or the aggregate of the rate with respect to reasonableness, and do not break it down. Now, of course, they do sometimes, I am sure, but usually I think that they do not do that; and that was what the petitioner wanted to know, what was a reasonable rate, aggregate rate; and I may say that the Burlington has the same rate from Concordia to Omaha as the Missouri Pacific has from Concordia to Kansas City, and both of those roads are precisely correct in accordance with the Commission's decision in the grain rate case, but the trouble is, of course, that the through aggregate local rates of the two railroads made an unreasonable rate, and the Commission prescribed this rate over the through route, and said, "You people can get together and decide what proportions you are going to assume".

Judge Sanborn: Let me get clear on that, Mr. Howell. Under the Commission's order could the railroads reduce their locals and comply with the order?

Mr. Howell: Oh, yes, Your Honor.

Judge Sanborn: They could do it that way, or they could [fol. 207a] establish a through route and agree upon division of the rate?

Mr. Hickey: A joint rate.

Judge Sanborn: They could establish a joint rate?

Mr. Howell: They could establish a through rate and agree on the division, and if they can't agree on the division the Commission will help them agree on it.

Judge Sanborn: So that you do not construe that order as requiring necessarily a joint rate?

Mr. Howell: No, Your Honor.

Judge Sanborn: Just a reduction so that the combination of the locals, or the through rate prescribed won't exceed the rate to Kansas City?

Mr. Howell: That is exactly right, Your Honor.

Judge Sanborn: And you don't agree with that?

Mr. Ware: No sir.

Mr. Howell: I would not expect him to.

Judge Sanborn: Was there something you wanted to say, Mr. Hickey?

(Continued on next page.)

[fol. 208] Mr. Hickey: No, except in that connection I do not think really, Mr. Ware, you will say that there was a joint rate prescribed? The words of the Commission's order simply was through rate.

Mr. Ware: I do not think it can be anything except a joint through rate, because it is a single factor rate over our line from the Kansas origins to Kansas City, and they said this rate over these lines is unreasonable to the extent that it exceeds the rates from these respective origins to Kansas City.

Mr. Hickey: I mean simply you will agree with me that the Commission's order in terms did not direct the prescription?

Mr. Ware: Not in language; not in terms; but under proper construction.

Mr. Hickey: Your Honor, I want to inquire about briefs. I have not ready at this time any brief. I intended to file what would more nearly approach a reply brief to that submitted prior to the hearing by the plaintiff, and in that connection, if it would be possible for us perhaps to have two weeks to submit that brief I would like to have it.

Judge Sanborn: You may have two weeks.

Mr. Hickey: I know Your Honor is fully aware of the necessity for filing a petition for reconsideration. Although [fol. 209] they may form part of the pleading, they do set forth the scope of the issues, so to that extent they may not be in the record before Your Honors.

Judge Hulen: I want to ask a question. Commenting on Judge Sanborn's question about what the issue is, as I understand you, you stated the Commission there was not a through route, but the Commission's order was obvious. In view of the fairness of counsel here, this issue was not raised before the Commission, that appears to be the position of counsel, and that is being urged strenuously here for the first time. Could the matter be sent back to the Commission for a decision on that?

Mr. Hickey: Your Honor may have in mind some other cases involving the same point; but our position briefly on that is as has been set forth in several cases by the Supreme Court and district courts, that it is not solely a question of exhaustion of remedies and giving the party a chance to make his case before the Commission by remanding; it is the failure of the party before the Commission to proceed in the way that it should and use its defenses, and, therefore, on that basis it should not have the ability later to get a review by the court. In other words, the courts have held that it is an act of negligence.

Judge Hulen: Suppose I put it this way: the Court should find that the railroad did attempt to raise the issue al- [fol. 210] though it was not passed on by the Commission?

Mr. Hickey: The Court would be very justified, in my opinion, in finding probably in accordance with the plaintiff's desires that the Commission—well, no, not quite. At least the Court would be justified in saying that there is not a sufficient finding by the Commission to inform us whether they had this in mind or not, and for that reason we remand it for findings, for complete findings on this point. That is in accordance with proper procedure. Mr. Ware's point is there is a finding or assumption but there is no evidence. It is a little different. It is a question primarily of evidence to support a finding rather than a finding to support a conclusion.

Judge Sanborn: You are not in disagreement, as I understand, with Mr. Howell's contention, whether there was a through route or not the order of the Commission involved a right, whether they have power to say whether the combination rate was reasonable or not?

Mr. Hickey: I won't quarrel with it. I do not mind his statement of apparent conflict. I will simply state that the Commission prescribed or directed a prescription of through rate, that is.

Judge Sanborn: Do you agree with Mr. Ware, you can't have a through rate unless you have a through route?

[fols. 211-212] Mr. Hickey: Yes, sir.

Judge Sanborn: Then you do agree with counsel—or perhaps I had better not ask that question. Perhaps you can help us out in your brief.

Mr. Hickey: Thank you. I hope to.

Judge Sanborn: Court will stand adjourned.

(Whereupon, at 12:20 o'clock p.m. Court was adjourned.)

Reporter's Certificate (omitted in printing).

[fol. 213] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 7769(1)

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, Debtor, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

FINAL JUDGMENT AND DECREE—Filed November 19, 1951

The above-entitled action having come on for final hearing on June 14, 1951, before a duly constituted district court of three judges, convened pursuant to Sections 2284(1) and 2325 of Title 28, United States Code, and all parties being represented by counsel and the Court having heard the arguments of counsel and having considered the pleadings, the evidence taken before the Interstate Commerce Commission, the arguments and briefs of counsel and the Court being fully advised in the premises and having filed its opinions herein on October 30, 1951, and, in accordance therewith, the majority of the Court being of opinion and concluding that the Interstate Commerce Commission's order entered July 10, 1950, is valid and lawful in all respects, it is hereby:

Ordered and adjudged and decreed, that the relief prayed for in the complaint be, and it is hereby, denied, and the complaint is dismissed, the plaintiff to pay the costs.

Dated this 19th day of November 1951.

John B. Sanborn, United States Circuit Judge;
Rubey M. Hulen, United States District Judge.

I do not concur.

Geo. H. Moore, United States District Judge.

[fol. 214] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed December 6, 1951

Now comes Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, plaintiff in the above-entitled cause, and, considering himself aggrieved by the final judgment and decree of this Court entered herein on October 30, 1951, hereby prays an appeal from the said final judgment and decree and from each and every part thereof to the Supreme Court of the United States.

The particulars wherein the said plaintiff considers the [fol. 215] judgment and decree of this Court erroneous are set forth in an assignment of errors filed herewith.

Pursuant to Rule 12 of the Supreme Court of the United States, as revised, there is also presented to this Court herewith a statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the said final judgment and decree of this Court.

Wherefore, the said Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, prays that his appeal to the Supreme Court of the United States be allowed and that a citation be issued in accordance with law; that an order be made fixing the amount of bond for costs on appeal; and that a transcript of the record, proceedings, and documents upon which said judgment and decree was based, duly authenticated, be transmitted to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

T. T. Railey, Geo. W. Holmes, Toll R. Ware, Attorneys for Plaintiff.

Date: December 6, 1951.

[fol. 216] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 6, 1951

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, having filed his petition for an appeal to the Supreme Court of the United States, from the final judgment and decree of this Court, entered on October 30, 1951, dismissing the complaint of the said Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, in the above-entitled cause, and having also filed his assignment of errors and statement disclosing the basis upon [fols. 217-220] which the Supreme Court of the United States has jurisdiction upon appeal to review the said final judgment and decree of this Court, and having in all other respects conformed to the statutes and rules of court in such cases made and provided;

It is, therefore, ordered and adjudged that an appeal to the Supreme Court of the United States as prayed for be and the same is hereby allowed.

It is further ordered that a citation issue, returnable within forty days from the date hereof.

It is further ordered that a certified copy of the record, proceedings, and documents upon which said final judgment and decree was based be transmitted to the Supreme Court of the United States under the rules of the Supreme Court in such cases made and provided.

It is further ordered that the said Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, give bond as security for costs on appeal in the sum of $250.00.

(S.) Geo. H. Moore, United States District Judge.

Date: December 6, 1951.

[fol. 221] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed December 6, 1951

Now comes Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, plaintiff in the above-entitled action, and files the following assignment of errors on which he will rely on his appeal to the Supreme Court of the United States from the final judgment and decree of this Court entered October 30, 1951:

[fol. 222] (1) The Court erred in failing to set aside, annul, suspend and enjoin the order of the Interstate Commerce Commission, entered July 10, 1950, in *Omaha Grain Exchange of Omaha, Neb.*, vs. *Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)* and *Chicago, Burlington & Quincy Railroad Company*, No. 29461 on the Commission's docket. It is reported in 278 I. C. C. 519, et seq.

(2) The Court erred in failing to set aside said order of the Commission on the ground that there is no evidence of record before the Commission to base and support its finding that a through route exists on grain and grain products from points in Kansas located on the Missouri Pacific Railroad (Concordia and west thereof) to Omaha, Neb., over the Missouri Pacific and Burlington via Concordia.

(3) The Court erred in failing to set aside the order of the Commission on the ground that the Commission was without power to prescribe through rates from the Kansas origins involved to Omaha in the absence of substantial evidence supporting the existence of a through route over the Missouri Pacific and Burlington via Concordia or without first making an order requiring the establishment of a [fol. 223] through route in accordance with the provisions of Section 15(3) and (4) of the Interstate Commerce Act. (54 Stat. L. 911) (49 U. S. C. A. Section 15 Paragraphs 3 and 4).

(4) The Court erred in finding or holding that "The complaint before the Commission sought no relief under Section 15 of the Act."

(5) The Court erred in finding that "The proceedings here for review are a complaint charging violation of Sec-

tions 1 and 3 of the Act and an order of the Commission conforming to the complaint."

(6) The Court erred in finding that "Consideration of right of the Commission to establish a through route under Section 15 of the Interstate Commerce Act is foreign to the record of the Commission presented here for review."

(7) The Court erred in failing to set aside the order of the Commission on the ground that said order is based on the following erroneous findings: (a) That through routes are already in existence from the Kansas origins to Omaha by way of the Missouri Pacific and Burlington through Concordia; (b) That the only relief sought by the complainant was reasonable rates over those routes; and (c) That it was unnecessary to discuss the provisions of Section 15(3) and [fol. 224] (4), since in the Commission's opinion those provisions of the Act constituted no bar to the prescription of reasonable rates over such routes.

(8) The Court erred in failing to make a positive finding that physical rail track connections alone do not constitute, or establish the existence of, a through route.

(9) The Court erred in holding that the listing of Concordia as a point of interchange between the Missouri Pacific and Burlington in the Railway Equipment Register, compiled by the various railroads and on file with the Commission, is a "holding out to the public the existence of facilities for operation and existence of a through route."

(10) The Court erred in finding or holding that "The fact that no grain has ever been shipped over the route at the combination rate is not conclusive that the route does not exist."

(11) The Court erred in failing to find that there is no evidence of record of any arrangement between the Missouri Pacific and Burlington for the continuous carriage of grain and grain products or any other commodity from these Kansas origins to Omaha, Neb., and Council Bluffs [fol. 225] or beyond.

(12) The Court erred in failing to hold that whether or not a through route exists from these Kansas origins to Omaha by way of the Missouri Pacific and Burlington through Concordia is a question of fact, not of law, and that the case of *Virginian Railway Company* vs. *United States*,

272 U. S. 658, relied upon by the Commission is not and cannot be authority for the Commission's conclusion of the existence of a through route between said points.

(13) The Court erred in finding or holding that the facts in *Virginian Railway Company* vs. *United States*, 272 U. S. 658, disclose a striking analogy to the present case.

(14) The Court erred in failing to find that the duty of the Missouri Pacific to establish through routes with other carriers and just and reasonable rates as required by Section 1(4), to provide equal facilities for the interchange of traffic between its line and connecting lines as required by Section 3(4), and to file with the Commission schedules showing all rates between points on its line which may be used in combination with local rates of another connecting line as required by Section 6(1) of the Interstate Commerce [fol. 226] Act, are all subordinate to the rights of the Missouri Pacific under Section 15(4) of the Interstate Commerce Act.

(15) The Court erred in failing to hold that the Commission is without power to prescribe through rates (joint or local rates which may be used in combination) between points on two or more lines in the absence of a through route over those lines, or an order by the Commission made pursuant to the provisions of Section 15(3) and (4) requiring the establishment of a through route over those lines.

(16) The Court erred in finding or holding that the "evidence of physical interchange connection at Concordia, plus any established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route."

(17) The Court erred in finding or holding that "The argument of the Missouri Pacific that the Commission's order will compel it to short-haul itself can find no basis in the record."

(18) The Court erred in finding or holding that "the [fol. 227] Commission's order does not direct appellant to 'short-haul itself' on any freight now being carried to Omaha by the Missouri Pacific."

(19) The Court erred in finding or holding that the Mis-

souri Pacific has exercised an assumed right to tell shippers where they shall consign their grain or control the grain markets.

(20) The Court erred in failing to find that the flow of grain from these Kansas origins into the primary markets is channeled on the basis of a rate adjustment prescribed by the Interstate Commerce Commission and which order prescribing said rates was published to become effective on July 1, 1935, and, subject to the general increases approved and authorized by the Commission, as in effect at the present time.

(21) The Court erred in failing to find that the order of the Commission of July 10, 1950 is predicated upon a misconstruction of the Interstate Commerce Act, and that it is unlawful, beyond the power of the Commission, arbitrary, capricious, unsupported by essential findings, and contrary to and without support in the evidence.

(22) The Court erred in denying the injunction and in dismissing plaintiff's complaint.

[fols. 228-254] Wherefore, the said plaintiff, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, respectfully prays that the final decree and order of the District Court entered October 30, 1951, dismissing the complaint of plaintiff herein, be reversed and that such other and appropriate relief be granted as to the Court may seem just and proper.

T. T. Railey, Geo. W. Holmes, Toll R. Ware, Attorneys for Plaintiff.

Date: December 6, 1951.

[fol. 255] [File endorsement omitted]

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 7769(1)

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

Appearances:

For Plaintiff: Messrs. T. T. Railey, George W. Holmes and Toll R. Ware, of St. Louis, Mo.

For Defendant: William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

For Intervening Defendant, Interstate Commerce Commission: Daniel W. Knowlton, Chief Counsel, and Samuel R. Howell, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

For Intervenor, Omaha Grain Exchange of Omaha, Nebraska: Oscar J. Moberg of St. Louis, Mo.

Before Sanborn, Circuit Judge, Moore and Hulen, District Judges

OPINION—Filed October 30, 1951

HULEN, Judge:

This is an action (28 U.S.C.A. §2325) brought by the Trustee of the Missouri Pacific Railroad Company to enjoin execution of an order of the Interstate Commerce Commission entered on July 10, 1950, requiring the carrier to establish reasonable rates for the transportation of grain and grain products shipped from points on its line in central Kansas to Omaha, Nebraska, and Council Bluffs, Iowa, over routes maintained between such points by the plaintiff (hereinafter referred to as Missouri Pacific) in connection with the Chicago, Burlington & Quincy Railroad (hereinafter referred to as Burlington), which rates were, by the Commission's order, not to exceed rates maintained by the carriers between similar origin points and Kansas City, Missouri.

[fol. 256] This cause was initiated before the Interstate Commerce Commission, on complaint filed by the Omaha Grain Exchange of Omaha, Nebraska, against the Missouri Pacific and the Burlington charging violation of Sections 1 and 3 of the Interstate Commerce Act. Section 3 of the complaint filed before the Commission contains the following paragraph:

> "That the defendants herein publish rates and maintain for transportation of grain and grain products to the market of Omaha, Nebraska (which includes Council Bluffs, Iowa) rates and charges that are unjust and unreasonable in violation of Section I. of the Interstate Commerce Act from points in Kansas located on the Missouri Pacific Railroad from Concordia, Kansas, and west, thereof known as the Central Branch, operating due west from Atchison, Kansas, and subjecting complainant to undue prejudice and disadvantage in violation of Section III. of the Interstate Commerce Act."

The prayer of the complaint sought the Commission's order as to each carrier "to cease and desist from the aforesaid violations of said Act and establish and put in force and apply in future from the territory named in paragraph 3 hereof to the market of Omaha such other rates as the Commission may deem reasonable and just * * *".

The complaint before the Commission sought no relief under Section 15 of the Act. The Commission granted no relief under Section 15 of the Act. The proceedings here for review are a complaint charging violation of Sections I and 3 of the Act and an order of the Commission conforming to the complaint. Consideration of right of the Commission to establish a through route under Section 15 of the Interstate Commerce Act is foreign to the record of the Commission presented here for review.

The Missouri Pacific operates a single line route westward from Atchison, Kansas (a point on its main north and south line between Omaha and Kansas City), through Concordia to Lenora, points which are 155 and 293 miles, respectively, west of Atchison. The territories of Concordia and Lenora are representative origin points for the shipment of grain to points such as Kansas City, Atchison, and Omaha, commonly referred to as the primary markets, from which points grain or products manufactured therefrom are re-[fol. 257] shipped to points east. In the processing of grain a differential of a cent in freight rates will adversely affect a market. A rate of 19 cents per hundred pounds is charged for a shipment of grain from Lenora to Kansas City. This shipment would move over the Missouri Pacific's line through Concordia to Atchison and then southward over its main line to Kansas City. The distance is 341 miles. For a shipment from Lenora to Omaha, through Concordia to Atchison, then northward to Omaha, the Missouri Pacific has a rate of 25.5 cents. The mileage is 449.5 miles. The Burlington operates a route into Concordia, and publishes a rate of 16 cents for a shipment from that point to Omaha, a distance of 187 miles. A shipment from Lenora to Omaha, moving to Concordia, thence over the Burlington's lines into Omaha, would travel 336 miles, or 5 miles less than the distance from Lenora to Kansas City, but the combination of rates applicable for such a through shipment is 30 cents, as compared to the 19 cent rate to Kansas City.

The Commission found:

> "As through routes are already in existence the combination rates over the short routes through Concordia by way of the Missouri Pacific and the Burlington, and the only relief here sought by complainant being reasonable rates over those routes, division 2 correctly concluded that it was unnecessary to discuss the provisions of section 15(3) and (4), and that those provisions of the act were no bar to the prescription of reasonable rates over such routes."

The Missouri Pacific does not seriously dispute the unreasonableness of the rates which were in issue before the Commission. Its petition for rehearing before the Commission states its reason for maintaining the rates complained of.

> "The route over which the rates are assailed is not a published tariff route; it is closed to all intents and purposes by reason of the fact that the rates applicable over said route are made a combination of locals on Concordia and are higher than the through rate over the single line route of the Missouri Pacific."

By this action the Missouri Pacific attacks the order of the Commission, claiming it creates a through route along the lines of the two carriers to Omaha, forcing Missouri Pacific to short haul itself, because it has its own local line [fol. 258] which by a longer route connects the Kansas points with Omaha.

All parties to this proceeding, in oral argument and by brief, concede the sole question is whether there was a through route in existence over the two carriers' lines via the Concordia connection, from Kansas points on Missouri Pacific's lines, west of Concordia, to Omaha and Council Bluffs, over the Burlington, at the time of the commencement of the proceedings before the Commission and the Commission's order.

If the finding of the Commission that a through route did exist is based on substantial evidence, its order should not be disturbed by this Court. There is a presumption in the absence of clear evidence to the contrary that the Commission has properly performed its official duties and this presumption supports its official acts. It is the providence of the Commission and not the Court to pass upon the weight and credibility of the evidence. It is no concern of this Court whether the conclusions of the Commission were correct if there is substantial evidence to support them.*

---

* Some of the testimony evidenced confusion as to what sections of the Act the proceedings were based on. But there is ample record showing the complaint assigned violation of Sections 1 and 3 of the Act, testimony was offered on that issue and the carriers so understood the issue. See testimony of witnesses Kuhn (p. 15), Vauck (p. 101), Thomas (p. 175), Allison (pp. 115, 128), and letter (p. 218).

We quote the definition of a through route which the Courts uniformly recognize:

> "A through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another. A joint rate is not essential. The through rate may as well be a combination of locals or proportionals." (*Grain and Grain Products*, 129 I.C.C. 261, 264.)

We find no case holding that one of the requirements of a through route is that it must be with respect to all character of merchandise. It seems elemental that a through route for merchandise carriage is the vital element in the arrangement. That the carrier by its own act, in fixing rates on certain commodities, may have restricted use of the route to [fol. 259] particular commodities does not destroy the conclusion that it is a through route under the definition. Where a route is open and available and adequate to meet the needs of the public there is no occasion for the Commission to prescribe another route.

The first requisite to a through route is a physical connection between the tracks of the connecting carriers. This physical feature is present in this case. Physical connection of the tracks alone does not necessarily mean a through route exists. The official railway equipment Register compiled by the various railroads is on file with the Commission. It shows that the two carriers involved in this case, as well as other carriers, each list Concordia as a point of interchange of traffic with other lines, thus holding out to the public the existence of facilities for operation and existence of a through route.

Each of the carriers has combination rates over its part of the line involved. Missouri Pacific admits a shipment of grain could be made at a tariff composed of a combination of the local rates. The combination rate is so high it commercially closes the route on grain products. The fact that no grain has ever been shipped over the route at the combination rate is not conclusive that the route does not exist.

L. E. Kipp, General Traffic Agent for various lines operating in the area involved in this case, including the Missouri

Pacific, has published on behalf of the carriers class rates for the shipment of specific commodities between points of origin in the area, on the line of the Missouri Pacific, and destination area, on the line of the Burlington, to stations short of Omaha, and over the route which the Commission found to be a through route. The parties conceded that these published rates are subject to judicial notice by the Commission and this Court. During oral argument counsel for the Missouri Pacific was asked whether or not as a result of the class rates in the Kipp publication they would issue a through bill of lading for a shipment on Missouri Pacific's [fol. 260] line to a point on the Burlington. The answer was—"We might do that, but not Omaha". Counsel was further asked the question—"would you admit that there is a through route over these two connecting routes to all points short of Omaha?". The answer—"There might possibly be to some of them, but it would be short of Omaha".

Missouri Pacific now takes the position that although a through route existed for some commodities this fact did not warrant the finding that the route existed for grain and grain products. It cites in support of its position the case of *Stickell vs. Alton Railroad Company*, 255 I. C. C. 333, and *California Milling Company vs. A. T. & S. Fe R. Co.*, 276 I. C. C. 531. We are unable to agree with appellant that these authorities support its position.

The Commission cited the case of *Virginian Railway Company vs. United States*, 272 U. S. 658, as authority for its conclusion of the existence of a through route. The facts in that case disclose a striking analogy to the present case. The Virginian line connected to 109 coal mines in West Virginia, all of which received service at reasonable rates to eastern points on the Atlantic Coast. The controversy arose in regard to shipments westward from these various mines. Combination rates had been published by the Virginian and Chesapeake & Ohio Railroads, which had a physical track connection west of these 109 mines. However, the combination rates were so high that the westward routes were commercially closed. (This was done purposely, because the Virginian wanted to divert all of the traffic eastward, wholly on its own line. The Commission in the instant case found that Missouri Pacific wanted to divert grain to Kansas City.) Subsequently the Virginian entered into an agreement with the Chesapeake & Ohio for reciprocal switching, whereby 45 of the 109 mines on the Virginian line would enjoy through routes at reasonable rates to the west. It was the other 64 mines which brought the complaint before the Commission, claiming that they also should enjoy [fol. 261] reasonable through rates to the west. These were the only two factors before the Commission to indicate the existence of a through route, namely the combination rates, excessively high, plus the through route privileges already enjoyed by some of the mines on the Virginian line. The Supreme Court held—"Through routes to the west were already in existence. And there were through rates by combination." (l.c. 666) The orders of the Commission in the *Virginian* case and the instant cases are similar. In neither case was a joint rate prescribed. The Commission found that the existing combination rate was unreasonable and discriminatory, and ordered it to be not higher than a specific amount. For such a finding and order, it is unnecessary that there be a finding of public interest as required under Section 15(3). (See footnote 1, l.c. 667.)

We conclude—evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route.

The argument of the Missouri Pacific that the Commission's order will compel it to short-haul itself can find no basis in the record. It is not now carrying any grain from the origin points in Kansas to Omaha because of its prohibitive rates. The present rate over appellant's line does not protect "its long-haul on this traffic" to Omaha. It follows the Commission's order does not direct appellant to "short-haul itself" on any freight now being carried to Omaha by the Missouri Pacific. The Supreme Court has declared there is no basis for the concept that restrictions on the power of the Commission to establish through routes, found in Section 15 of the Act, should also be applied to limit the power of the Commission to establish reasonable rates. *A. T. & S. F. Ry. vs. United States*, 279 U. S. 768, l.c. 776.

[fol. 262] Execution of the Commission's order may result in some loss of revenues by diverting grain shipments from Kansas City to Omaha but this probable result creates no right in the abstract for the Missouri Pacific to tell shippers where they shall consign their grain or control the grain markets. Regulations of the Interstate Commerce Commission are not alone for the benefit of the carriers; the public has an interest as well. It is for the Commission to balance and determine how these interests shall be preserved. *Stickell vs. Alton Railroad Company, supra,* l.c. 337, as follows:

> "It is not the province of railroads to determine what markets shall be available to sellers or buyers, or by * * * the maintenance of rate disadvantages to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets."

Injunction denied and plaintiff's complaint dismissed.

(S) John B. Sanborn, Rubey M. Hulen.

[fol. 263] DISSENTING OPINION

MOORE, Judge:

I am unable to agree with the opinion of the Court. I would hold the order invalid, and enjoin its enforcement.

The Missouri Pacific has its own route between the representative origin points to Omaha, which route passes through Concordia. It desires, of course, to handle shipments between these points on its own line, on which the rate for grain is 25½ cents, which rate has not been attacked and is presumably reasonable: That rate, however, is 6½ cents higher than the rate from the representative origins to Kansas City, the Kansas City route being over a hundred miles shorter than the Missouri Pacific route to Omaha. The result, of course, is that Omaha cannot compete with Kansas City.

The Burlington connects Omaha and Concordia, and intervening points. From the representative origin points to points on the Burlington between Omaha and Concordia there are published joint class rates for certain commodities. The joint class rates cease short of Omaha, and the [fol. 264] rate to Omaha via the Burlington (hereinafter called the Concordia route) is a combination rate of 30 cents, the combination rate being made up for the sum of the local rates of 16 cents and 14 cents.

Missouri Pacific admits that the combination rate over the Concordia route is so high as to be prohibitive, but it states that "the publication of those local rates, the combination of which is higher than the through rate over the Missouri Pacific direct, was the only effective means the Missouri Pacific had of telling the shipping public that through grain traffic from * * * [the points of origin]. * * * would not be handled over these lines." Missouri Pacific also argues that the Commission's order will require it to shorthaul itself in violation of Section 15(4) of the Act.

There are, obviously, points on the Burlington between Concordia and Omaha which cannot be served by the Missouri Pacific Missouri River route. Consequently, under Section 1(4) of the Act, Missouri Pacific was under a duty to establish reasonable through routes upon request therefor from the origin points to Concordia on its line, and from Concordia to points short of Omaha on the Burlington. The Missouri Pacific has apparently complied with this duty, as counsel for the Commission state that such through routes exist.

Insofar as the duty to establish a through route via the Burlington from the points of origin to Omaha is concerned, it should be noted that the Missouri Pacific can and does provide transportation between these points over its own route. Section 15(3) of the Act provides that the Commis- [fol. 265] sion may establish through routes necessary or desirable in the public interest. Section 15(4) makes an exception to the extent that the Commission may not, in establishing a through route, require a carrier to shorthaul itself, unless the carrier's longhaul route is found to be unreasonably long, or unless the proposed through route is necessary to provide adequate and more efficient transportation; and that subject to these limitations and so far as consistent with the public interest, the Commission shall give reasonable preference to the carrier which originates the traffic. Within the limitations of Section 15(4), railroads are entitled to decline to establish through routes which will short-haul them. Missouri Pacific was under no duty to establish a through route to Omaha via Burlington, until the additional requirements of Section 15(4) were met. The position of the Missouri Pacific is that the requirements which must be met before the Commission can establish a through route under Section 15(4) do not now exist.

The only issue presented by this appeal is whether the Commission had the authority to prescribe the through combination rate over the Concordia route. The Commission found that a through route existed, and it argued that if a through route did exist, then the Commission had authority to prescribe the through combination rate. The issue then is whether the evidence supports the Commission's finding of an existing through route. The facts on which the Commission has relied to support this finding are the following:

[fol. 266] (1) physical connection of the Missouri Pacific and Burlington tracks at Concordia; (2) the listing of Concordia in the official railway equipment register as a point of interchange with other lines; (3) the establishment of through rates to points short of Omaha on specific commodities; and (4) the evidence of a combination rate over the route in question.

Counsel for the Government admitted in oral argument that the fact of physical connection alone was not sufficient to establish a through route. The Commission argues that the establishment of joint class rates to points short of Omaha on the Concordia route is evidence of a through route to Omaha, as "through routes to certain points may be indicated by the presence of through routes to other points on the same line, although the carrier may not have intended such results". *Through Routes and Through Rates*, 12 ICC 163, 168.

As pointed out above, the Missouri Pacific was under a duty to establish reasonable through routes upon request to points short of Omaha under Section 1(4) of the Act, and if such routes had not been established, the Commission could have ordered them if they were found to be in the public interest under Section 15(3). Yet Missouri Pacific was under no duty to establish a through route to Omaha on the Concordia route merely because that route would be reasonable and desirable in the public interest. The policy of the Act permits the carrier additional protection where, as here, such a through route will force it to short-haul itself. Section 15(4). I do not believe that it was the inten- [fol. 267] tion of Congress to establish a rule that a carrier's compliance with its duty under Section 1(4) of the Act should cause it to lose a right given it under Section 15(4).

Moreover, the Commission's statement in *Through Routes and Through Rates, supra,* that "through routes to certain points may be indicated by the presence of through routes to other points on the same line" relied on an earlier case, *Violations of the Act to Regulate Commerce,* 8 ICC 290, 301. Examination of the latter case reveals that it does not support the quoted statement. The Commission in that case had before it a situation where the railroad had established joint rates from one point, Springfield (Southwest of St. Louis), on its line to Chicago, but had refused to establish through rates to Chicago from intermediate points between Springfield and St. Louis. From these intermediate points, closer to Chicago than Springfield, it actually cost more to ship to Chicago than it did to ship from Springfield. The Commission held that this practice was unlawful, relying on the ruling of the Supreme Court in *Cincinnati, N. O. & T. P. Ry. Co.* v. *ICC*, 162 U. S. 184, which was based on Section 4 of the Act.

Section 4 prohibits carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction, *the shorter being included within the longer distance*" (Emphasis mine). The purpose of this section is to forbid "any undue or unreasonable preference or advantage in favor of any person * * * or locality". *Texas & Pacific Ry.* v. *ICC*, 162 U.S. 197, 219-220. The prohibitions of Section 4 should not be distorted [fol. 268] into a rule of law which would imply a through route over an entire line, where there is a through route over only part of that line. On the contrary, the fact that the joint rates cease short of Omaha would logically give rise to an inference that the through route ceases at the same point—particularly where there has been no transportation beyond that point.

Nor do I think that the listing in the official register of Concordia as a point of interchange with other roads is any evidence to support the finding of a through route to Omaha. Since traffic to points short of Omaha existed, it is difficult to see how Concordia could be listed otherwise.

The last fact relied on by the Commission in support of the finding of a through route, is the existence of the combination rate over the Concordia route. Under Section 6(1) of the Act, Missouri Pacific was under a duty to publish the rates to points short of Omaha on that route. But in the absence of the establishment of a through route all the way to Omaha, that section did not require it to publish the combination rate to Omaha. Missouri Pacific states that the publication of the combination rate to Omaha was necessary to inform the public that that route was commercially closed and that shipments to Omaha would be handled only on its own Missouri River line to Omaha.

The combination rate is the sum of the local rates and is so high as to be prohibitive, with the result that the route is commercially closed. It may, nevertheless, be a through [fol. 269] rate, and a through rate presupposes a through route.

> "A through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another. A joint rate is not essential. The through rate may as well be a combination of locals or on proportionals." *Grain and Grain Products*, 129 ICC, 261, 264.

There is no doubt that here there is a through rate, a combination of locals, although the route is commercially closed because the rate is prohibitive. The fact that a route is so closed has been held not to bar the Commission from prescribing reasonable and nondiscriminatory through (but not joint) rates under Sections 1 and 3 of the Act, without proceeding under Section 15(3). *Virginian Ry Co.* v. *U. S.*, 658, 666-667.

The present case can be distinguished from the *Virginian* case. Though the Court said in the *Virginian* case that the through route was commercially closed, there was an open through route in existence from points on the Virginian on either side of the complainants' mines, the complainants' mines "being entirely surrounded by mines taking the district rate which * * * [complainants] * * * seek". *Wyoming Coal Co.* v. *Virginian Ry. Co.*, 96 ICC 359, 361. The Commission there found that the plaintiff shippers were subjected to undue prejudice by this arrangement and that the rates were themselves unreasonable. The Concordia route in the present case is closed to everybody. And in the *Virginian* case, the short houl factor was not present, and only Section 15(3) was involved. The Virginian was merely attempting to build up a coal traffic in one direction. Section 15(4) permits carriers to avoid shorthauling themselves.

[fol. 270] The definition of a through route states that it is an arrangement for continuous carriage between points on different lines. In actual practice, the arrangement here was one which prohibited continuous carriage to Omaha over the Concordia route. I think that such a technicality as a commercially closed route should not, in view of Section 15(4), be considered evidence of a through route.[1] I therefore conclude that the finding of an existing through route is not supported by the evidence and that the relief prayed for should be granted.

Nor do I agree with the argument that the Commission's order will not require the Missouri Pacific to short-haul itself, because there is no grain traffic to Omaha at this time on the Missouri Pacific's single line route. Clearly, the Concordia route embraces substantially less than the entire length of the Missouri Pacific's road which lies between the termini of that route. The language of Section 15(4) is clear and without ambiguity, and the Court is "not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction * * *. Construction may not be substituted for legislation." *United States v. Missouri Pacific Ry. Co.*, 278 U. S. 269, 277.

---

[1] Commissioner Eastman, concurring on *Beaman Elevator Co.* v. *C. & N. W. Ry. Co.*, 155 I. C. C. 313, 315, after consideration of the *Virginian* case, stated that through routes "may, and frequently do, exist where there are combination rates.

Plaintiff also cites decisions of the Interstate Commerce Commission which apparently hold that the Commission [fols. 271-279] ought not to order lower combination rates, where combination rates already exist, even though it has the power to prescribe such rates, on the ground that to do so would be to require the carrier to short-haul itself in violation of Section 15(4).[2] In view of my decision that there is no evidence to support the Commission's finding of the existence of a through route, it is unnecessary to decide this question. A further point is made by plaintiff, to the effect that the order requires the establishment of joint-rates. But it is clear that the order, if not otherwise invalid, could be complied with by establishing lower combination rates.

Dated this 30th day of October, 1951.

(Signed) Geo. H. Moore, United States District Judge.

[fol. 280] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 281] [File endorsement omitted.]

---

[2] *Western Pacific Ry. Co. v. Northwestern Pacific Ry. Co.*, 191 ICC 127; *Port of New York Authority v. A. T. & S. F. Ry. Co.*, 144 ICC 514, 517, 518; Commissioner Eastman's concurring opinion in *Beaman Elevator Co. v. C. & N. W. Ry. Co.*, 155 ICC 313, 315. See also *R. C. Williams & Co. Inc. v. N.Y.C. Ry. Co.*, 269 ICC 297, 300, and *Lourie Mfg. Co. v. C.N.R.R. Co.*, 42 ICC 448. In the latter case, cited in the *Virginian* case, for the proposition that there were through rates by combination, the Commission distinguished the case from another case in which combination rates over a commercially closed route were held not to create a through route.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.—Filed January 16, 1952

Now comes appellant, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, in compliance with Rule 13, paragraph 9, of this Court, and states:

(A) Appellant adopts for his statement of points upon which he intends to rely in his appeal to this Court, the points contained in his Assignment of Errors heretofore filed.

[fol. 282] (B) Appellant designates the following portions of the record, as filed in the above-entitled case, for printing by the Clerk of this Court:

1. Complaint filed with the Interstate Commerce Commission on January 14, 1946, by the Omaha Grain Exchange of Omaha, Nebraska.
2. Transcript of the hearing before Examiner C. E. Stiles at Omaha, Nebraska, on April 17 and 18, 1946.
3. Reproductions of Exhibits Nos. 1-6, inclusive, filed by the Omaha Grain Exchange with the Interstate Commerce Commission at the hearing on April 17 and 18, 1946.
4. Report by Division 2 of the Interstate Commerce Commission, decided August 31, 1948.
5. Report of the Interstate Commerce Commission on Reconsideration, decided July 10, 1950; also its order dated July 10, 1950.
6. Complaint filed in the District Court of the United States for the Eastern District of Missouri, Eastern Division, on February 12, 1951, in Civil Action No. 7769, but *excluding* the affidavit of A. Kuepfert and Exhibits Nos. 1, 2, 3 and 4, which are attached to and made a part of the complaint.
7. Answer filed by the United States of America in Civil Action No. 7769.

[fol. 283] 8. Answer filed by the Interstate Commerce Commission in Civil Action No. 7769.

9. Answer filed by the Omaha Grain Exchange in Civil Action No. 7769.

* * *

13. Transcript of proceedings before the statutory Three-Judge Court at St. Louis, Missouri, on June 14, 1951, in Civil Action No. 7769, consisting of pages 1-77, inclusive.

14. The majority opinion written by United States District Judge Hulen and concurred in by United States Circuit Judge Sanborn; also the dissenting opinion written by United States District Judge Moore, both filed with the Clerk of the United States District Court on October 30, 1951.

15. Final Judgment and Decree entered in Civil Action No. 7769 on November 19, 1951.

16. Appellant's Assignment of Errors.

[fols. 284-285] T. T. Railey, Geo. W. Holmes, Toll R. Ware.

[fols. 286-288] Certificate of Service [omitted in printing]

[fol. 289] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—March 3, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.